THE JURIST

Volume II JULY, 1942 No. 3

PIUS XII: 1917-1942

Dedicated to the beneficent ministrations of law in society, THE JURIST is privileged under a multiple title to offer its heartfelt congratulations on the occasion of his episcopal silver jubilee to the eminent canonist on the Throne of St. Peter. As commentator, codifier, diplomat and minister, he has merited the esteem of legists everywhere who know that they have far to seek to find his equal. They are honored then to observe with him a milestone in the path of his achievement. They are heartened, too, by the confidence that springs from his juristic competence; and they hopefully anticipate the opportune employment of that skill in the healing of anarchy's wounds.

In Memoriam

BISHOP CORRIGAN

On June 12, His Eminence, Dennis Cardinal Dougherty, pronounced final absolution over the mortal remains of one whose death is deeply mourned by the administration of THE JURIST. In the Shrine of the Immaculate Conception on that day no one stood by the bier with a more profound sense of loss than the founders of THE JURIST. The role of Bishop Corrigan in laying its foundations was not noticed by his eulogists, for it was buried beneath the mass of the noteworthy achievements of his administration. But indelibly inscribed in the memory of the founders, its significance loomed large even in so arresting a company of historic deeds. It was assuredly not the least of the glories that crowned Bishop Corrigan's regime, marked though the latter was by the visit of our Holy Father, the observance of the University's golden jubilee, and the drafting of the permanent constitution.

Even among the numerous other claims to renown that filled an eventful life, THE JURIST, resting on the sound policy he bequeathed it, may hope to be no less a monument to him than any of the others. Social work, indeed, felt the impact of his generous character when in Philadelphia he directed its activities; priests were trained in Philadelphia and Washington under the influence of his sane advice; the laymen's retreat movement was definitely advanced under his nurturing leadership. But among the legacies to posterity laid up during a rich priesthood of thirty-nine years, THE JURIST will not be, if it remains true to his sagacious counsel, the least bountiful in its ministry to the cause he loved and served.

Holding this fruition to be its joyous destiny one may confidently rely on the suffrages of him who is now so much more favorably situated to aid. In it his personality will endure, an object of grateful prayers that its harvest of good may redound, should that be needed, to the repose of his magnanimous soul.

TWO HUNDRED YEARS—"ETSI PASTORALIS"

(1742-1942)

May 26, 1942 marked the passing of 200 years since the Constitution of Benedict XIV *"Etsi Pastoralis"* became law. The anniversary is worth mentioning for it is without doubt an outstanding work of Papal legislation. *"Etsi pastoralis"* is significant for many reasons and from various aspects. It is one of the most important laws of the Oriental Catholic Church and at the same time it is closely tied up with the laws of the Latin Church. It is a historic witness to the esteem of the Holy See for the peculiar character of the Oriental disciplines. Last but not least, it is an example and proof of the work as Pope of Benedict XIV. *"Etsi pastoralis"* is among the first of his activities springing from his desire for reform and order.

"Etsi pastoralis" was not only a result of the Pope's initiative, but very probably was entirely or to a very decisive extent his personal work, and not of the competent theologians and canonists of the Propaganda Fide.[1]

Originally *"Etsi pastoralis"* was intended for the Italo-Greeks and Italo-Albanians,[2] as the Constitution determined the territorial limits of its competency as such, ". . . tam in ditione nostra ecclesiastica et utraque Sicilia quam in reliquis Italiae partibus et insulis adiacentibus." The document is in its background the close of a very extensve period of legislative activity on the part of the predecessors of Benedict XIV. This the constitution points out by referring to the legislation of several Popes beginning with Innocent IV[3] and ending with Clement VIII.[4] To a certain extent, *"Etsi pastoralis"* can be considered a "Code for those Greeks who have their domicile in Italy and the adjacent islands",[5] but at the very

[1] Ieromonaco Isodoro (Isidorus Croce) in: *Codificazione Canonica Orientale*, Fonti, Fascicolo VIII (1932), p. 260. The personal and private advisors probably were Giuseppe Simone Assemani, Stefano Evodio Assemani and Felice Samuele Rodotà.

[2] The constitution speaks about "Graeci" and "Albanenses". Concerning the history of Italo-Greeks and Italo-Albanians see Adrian Fortescue, *The Uniate Eastern Churches* (1923), pp. 47 seq. and pp. 115 seq.

[3] Innocentius IV, epistula *"Sub catholicae"*, 6 mart. 1254.—*Fontes*, n. 34.

[4] Clemens VIII, instructio *"Sanctissimus"*, 31 aug. 1595, the famous "Clementina" of the Italo-Greeks.—*Fontes*, n. 179.

[5] Amleto G. Cicognani, *Canon Law*, I (Philadelphia: Dolphin Press, 1934), 450.

least it is "l'ultimo documento legislativo di una ampiezza reguardante gli Italo-Greci ed Italo-Albanesi".[6]

Based upon a century-old tradition this Constitution deals in a fundamental and securely rooted manner with the ecclesiastical life of the Italo-Albanians. It begins with a chapter on theological questions.[7] Then it deals with all the essential problems of Sacramental Law,[8] always with an eye to ritual and inter-ritual questions. It ends with regulations of the power of jurisdiction of the Latin Ordinaries, but comprising also other questions of rite and law.[9]

Unquestionably this constitution marked the closing of a period of development and settled for a long time many problems of the Oriental Church in Italy. But the spirit of this Constitution and its outstanding value put it at the same time at the beginning of a new period for Oriental Catholic Canon Law. This is why "*Etsi pastoralis*", far beyond its territorial and material limits, became a basis for succeeding ecclesiastical legislation.

History has proved that this Constitution by making for order was an essential contribution to the revival and invigoration of the Oriental branch of the Catholic Church in Italy. It is true that comparing the norms of this constitution with some modern tendencies of Oriental Canon Law, many a measure of "*Etsi pastoralis*" seems rather restrictive. But on looking back upon the history of the past two centuries the influence of "*Etsi pastoralis*" is seen to have been a strong bulwark against a progressive latinization. Although we still find in this Constitution the idea of the *praestantia latini ritus,* it was one of the important milestones on the road toward a complete restoration of the equality of all the rites of the Catholic Church, finally achieved by the legislation of Pius IX in 1867.[10]

The principles underlying "*Etsi pastoralis*" were responsible for its positive ideas being extended far beyond the original territorial limits of this Constitution. When Clement XIV in 1771 elevated the Apostolic Vicariate of Mukačevo to an episcopal see, the principles of "*Etsi pastoralis*" were applied to this new diocese.[11] We

[6] Isidoro, *ibid.*, p. 257.

[7] § 1. De Fide Catholica.—*Fontes,* n. 328.

[8] § 2. De Sacramento Baptismi, pueris baptizatis, ritusque in Baptismate suscepti mutatione. § 3. De Sacramento Confirmationis. § 4. De Oleo Sancto Christmatis, Catechumenorum, et infirmorum. § 5. De Sacramentis Poenitentiae, et Extremae Unctionis. § 6. De Sacramento Eucharistiae, et Missae Sacrificio. § 7. De Sacramento Ordinis. § 8. De Sacramento Matrimonii.

[9] § 9. Ritus Graecus qua ratione in Italia, et Insulis adiacentibus servandus. De Graecorum, seu Albanensium subiectione Episcoporum Latinorum iurisdictioni.

[10] S. C. Prop. Fide, 15 iunii 1867.—*Codificazione Canonica Orientale,* Fonti, Fascicolo II, p. 449. Cf. Isidoro, *loc. cit.,* p. 259.

[11] "*Eximia regalium*", 19 oct. 1771—*Ius Pont. de Prop. Fide,* IV, 176 seq. Mukačevo is the ecclesiastical centre of the Carpatho-Russians. In the United States Catholics of the Byzantino-Slavonic rite, originating from Carpatho-Russia, have their diocese in Homestead, Pennsylvania. To this diocese also belong Catholics of the same rite, originating from Rumania (Transylvania), Croatia and Serbia.

find the same principles in the Papal bulls of Pius VII creating the dioceses of Oradea Mare for the Rumanian Oriental Catholics [12] and of Križevci for those from Croatia and Serbia.[13]

Thus *" Etsi pastoralis "* found its way to the Catholics of the Byzantino-Slavonic rite of the Danubian Basin. In the 19th century the Propaganda Fide extended it to the Church of the Melkites of Marseilles in France,[14] and to the faithful of the same rite in Paris.[15]

But even on this continent *" Etsi pastoralis "* gained importance and significance. The Apostolic Letter *" Ea semper "* of June 14, 1907, constituting for the first time more determined rules for the ecclesiastical life of the " Greek-Ruthenians ",[16] is also based upon the principles of this old Constitution. The ensuing development indeed, beginning with the decree *" Cum episcopo "*,[17] already follows more distinctive lines, considering the different situation in the New World. Nevertheless, *" Etsi pastoralis "* still belongs to the juridical background and continues to be of legal value, especially for Oriental Catholics from Italy in this country.

Finally it must not be forgotten that *" Etsi pastoralis "* has exercised no small degree of influence on the Code. It is one of the sources of the legislation of the Code regarding inter-ritual relations.[18] After all, it was the questions of inter-ritual—or as the modern Oriental canonists prefer to say, interdisciplinary—law that conferred such great importance on this Constitution from the beginning. The constant enlargement of ecclesiastical legislation regarding Oriental Catholics, the effort to bring the Orientals under the jurisdiction of their own ordinaries, wherever this might be possible and useful, brought it about that the modern development improved upon or went far beyond the basic ideas of *" Etsi pastoralis "*. For all that, *" Etsi pastoralis "* did not cease to be living law.

This Constitution is a grand example of the organic statics of ecclesiastical legislation. Drawing from the rich treasure of the experience of a century-old tradition, based upon the unchangeable and eternal principles of the Church of Our Lord, this law lasted for two centuries. It is not a forgotten anachronism, not a torpid and dead law, but a living norm: not a bar to, but the companion of a constant development.

The Catholic University of America Willibald M. Ploechl

[12] *" Indefessum personarum "*, 16 iun. 1777—*Schematismus historicus Venerabilis Cleri dioecesis M. Varasdinensis graeci ritus Catholicorum* (1900), pp. 25-32.

[13] *" Charitas illa "*, 17 iun. 1777.—*Ius pont. de Prop. Fide*, IV, 207 seq.

[14] 13 ian. 1823, Actus (1823) pp. 12-13.

[15] 12 maii 1890, Litterae S. C. de Prop. Fide (1890), pp. 182-186.

[16] John A. Duskie, *The Canonical Status of the Orientals in the United States*, n. 48, The Catholic University of America Canon Law Studies (Washington, D. C., 1928), pp. 40 seq.

[17] 17 aug. 1914—*A.A.S.*, VI (1914), 458 seq.

[18] P. Gasparri, *Fontes*, I, n. 328.

AMERICAN RESEARCH IN MEDIAEVAL LEGAL HISTORY*

I

Historical Jurisprudence and Mediaeval Legal History

IT was little more than a hundred and twenty-five years ago when German jurisprudence, led by men such as Friedrich Karl Savigny, Karl Friedrich Eichhorn, and Jacob Grimm, emphatically pointed out the historical nature of law, in opposition to the then dominant theory of the Law of Nature.[1] The eighteenth century had postulated that there was only one true law, a human law to be derived immediately from reason, eternally unchangeable and everywhere identical. The fields of jurisprudence and of ethics were taken to be the same. It was sought to make law coincident with morals. The science of law and the authority of legal precepts were based solely upon reason: jurists believed that a complete and perfect system of legal precepts could be built up upon principles of natural law discoverable by reason and derived from the ideal of the abstract man. Legal precepts were made to conform to what each particular writer thought on ethical grounds they should be.[2]

* Address presented at the meeting of the Riccobono Seminar for Roman Law, The Catholic University of America, Washington, D. C., January 14, 1942.

[1] There is no comprehensive work on the history of Legal History in Europe. As to the German historical school and the spread of its influence in Europe, in particular, the reader is referred to the following general works and specialized monographs respectively: Ernst Landsberg, *Geschichte der deutschen Rechtswissenschaft*, III (Munich and Berlin, 1910); with bibliography in III, 2, 98 f.; additional bibliography up to 1936, in Eduard Fueter, *Geschichte der neueren Historiographie* (third ed.; Munich, 1936), p. 636; Paul Koschaker, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* (Munich and Berlin, 1938); E. Rothacker, "Savigny, Grimm, Ranke," *Historische Zeitschrift*, CXXVIII (1923), 415-445; Roscoe Pound, *Interpretations of Legal History* (Cambridge, Engl., 1930); Hermann Kantorowicz, "Savigny and the Historical School of Law," *Law Quarterly Review*, LIII (1937), 326-343; Roscoe Pound, article "Jurisprudence," in *Encyclopaedia of the Social Sciences*, VIII (New York, 1937), pp. 477-492.

[2] R. Pound, *Enc. of Social Sciences*, VIII, 480.

With the nineteenth century came a new mental orientation, Romanticism, which quickly gained dominant influence in the world of thought and thus also induced a change in the views concerning the nature and growth of law. In reaction against the law-of-nature school, it produced the doctrine of the historical origin of law. Law, it held, was merely a part of the national life as a whole.[3] Accordingly, the former, like the latter, manifests in its necessary historical evolution the universal human spirit in the different individual national mentalities. Just as the language of a people forms itself out of an inner urge and is not the invention of grammarians but the organic product of the national spirit creating spontaneously, almost unconsciously: so also does the law of a people, particularly in the earliest periods, grow directly out of folkways of thinking as custom, corresponding to the needs of everyday-life and the general *consensus* regarding right and wrong. As later on a given language comes under the discipline of the grammarians, but can be further developed by them only in accord with its natural disposition and popular usage, and cannot be forced on paths of a different nature: so law, too, under more advanced circumstances, passes into the hands of the jurists and legislators; these, however, can carry forward only the popular, national views that is, bring the existing germs to maturity, but cannot *ad libitum* posit any new law content. The stem of the law always remains the original one, rooted in the long-ago past. Thus the present is invariably conditioned by the past from which the law has grown within the organic complex in the course of development.

It may be assumed, as generally accepted nowadays, that this historical conception, which found its best known expression in the coordination of the linguistic and legal development, derives from the romantic movement. In the last analysis, it goes back through Hegel to Herder's concept of

[3] For the following outlines see mainly Ernst Landsberg, "Friedrich Karl von Savigny," separate publication from *Allgemeine Deutsche Biographie*, XXX (Leipzig, 1890), pp. 16 ff.; also Landsberg, *op. cit.*, III, 1, 204 ff.

a *Volksgeist,* the essential character of a people, decidedly influenced by climate, tradition, time and milieu. This *Volksgeist* becomes the historical character of a people, being regarded as the very center of its history. Depending on the *Volksgeist* and parallel in their development, are the evolution of religion, art, philosophy, and law.[4] The law as an emanation of the *Volksgeist* spreads in organic evolution over peoples and periods. Therefore law must be derived inductively from history, only from history. That disposes of the puppet, the " wise law-giver," who without uncertainties and controversies creates an ideal law *ex nihilo.* The justice of a law, anywhere and at any time, thenceforth rested on unprovable subjective, that is on not systematically elaborated judgments of value. As Savigny puts it: [5] " All knowledge of anything objectively given is designated as historical knowledge. It follows that the whole character of the science of legislation must be historical." Therewith it was also demonstrated that the history of law represents more than an elegant accessory of jurisprudence, that it is indeed a substantial instrument for the comprehension of the law in force, and is only one of the avenues of scientific approach to the deepest-lying evolutionary struggles of the human mind.

Savigny's new doctrine which here designedly received a somewhat extensive characterization, immediately met with almost universal and appreciative acceptance. This was possible because it went along with the general current in the science, politics and life of the first half of the nineteenth century.[6] Historiography then found renovation through Barthold Georg Niebuhr. Philology had preceded it with Friedrich August Wolf. Nationalism rose in reaction against

[4] Cf. Landsberg, *op. cit.*, p. 213; Hermann U. Kantorowicz, " Volksgeist und historische Rechtsschule," *Historische Zeitschrift,* CVIII (1912), 295-325; Marcel Grilli, " The Nationality of Philosophy and Bertrando Spaventa," *Journal of the History of Ideas,* II (1941), 344; Guido Kisch, " Biblical Spirit in Mediaeval German Law," *Speculum,* XIV (1939), p. 38, note 1.

[5] Hans Fehr, *Die Ausstrahlungen des Naturrechts der Aufklärung in die neue und neueste Zeit* (Bern, 1938), p. 15.

[6] Landsberg, " F. K. von Savigny," p. 17 f., 20 f.

the Napoleonic Empire, the historical traditions of constitutional law in reaction against the French revolution. In this process, none the less, the more liberal conceptions of the Rule-of-Law State had won a definitive victory over the happiness mongering of the Police State with its inclination to arbitrary law-making. Undoubtedly all these circumstances had prepared the way for Savigny's doctrine, accompanied and completed it. Savigny, however, exploited the historical *Zeitgeist* historically in his scientific work. He became the head of the Historical School of Law that originated in Germany, influenced and elevated the whole conception of state and history, civilization and law throughout the educated world and remained determinative for nearly a century. It is simply not possible to consider the history of the science of legal history without taking into account the influence exerted by Savigny's doctrine of the genesis of law on the development of methodology of jurisprudence. In Savigny's teaching, "that substance of the law is given in the entire past of the nation," the task of jurisprudence was clearly defined: to trace the history of the valid law back to its origins in order to learn to understand the state of the valid law from within. Accordingly the study of Roman law, then still in force in a great part of Europe, was the first to be taken up. The whole of the modern critical investigation of the history of Roman law is thus to be credited to the historical school. But the national development of law and its modification by foreign elements in the course of its history were also not neglected. What Savigny performed for the history of Roman law finds a parallel in the achievements of Karl Friedrich Eichhorn and Jacob Grimm in the history of German law.[7] Soon Canon law too and its sources were drawn under the

[7] Ferdinand Frensdorff, "Das Wiedererstehen des deutschen Rechts. Zum hundertjährigen Jubiläum von K. F. Eichhorns Rechtsgeschichte," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, German. Abt., XXIX (1908), 1-78; Rudolf Hübner, "Karl Friedrich Eichhorn und seine Nachfolger," *Festschrift für Heinrich Brunner zum 70. Geburtstag* (Weimar, 1910), pp. 807-838.— Rudolf Hübner, *Jacob Grimm und das deutsche Recht* (Göttingen, 1895).— Otto Gierke, *Die historische Rechtsschule und die Germanisten* (Berlin, 1903).

sway of the method of historical research.[8] Thus the rise of that generation of great scholars who created the fundamental and imperishable works on the history of Roman, Germanic and Canon law. To mention but a few of the most important names from the culminating period of the historical movement: in the field of history of Roman law: Georg Friedrich Puchta, Moritz August von Bethmann-Hollweg, Friedrich Ludwig Keller, Rudolf Sohm, Theodor Mommsen, Ludwig Mitteis, Otto Lenel; in the domain of the history of German law: Wilhelm Eduard Albrecht, Wilhelm Eduard Wilda, Georg Beseler, Gustav Homeyer, Otto Stobbe, Richard Schröder, Heinrich Brunner, Otto Gierke, Karl von Amira; and for Canon law: Ernst Adolf Th. Laspeyres, Aemilius Ludwig Richter, Johann Friedrich Schulte, Emil Friedberg, Ulrich Stutz.

From the names aforementioned, confined indeed to men no longer living, yet reaching down into our own day, those acquainted with the subject will readily see that the more recent stage of development in the science of legal history has here also been taken into account. In the eighties and nineties of the past century there arose a new school of research which, in a different sense and perhaps with more justification than Savigny's, merited the appellation historical. For the Savigny school the history of law subserved after all only the practical purpose of a better understanding of contemporary law, while to the new school historical research and knowledge were an end in itself. There developed a new and purified conception of the history of law which could not fail to remain foreign to Savigny's historical school because of the latter's practical and dogmatic tendencies—a history of law, namely, which undertook to probe the development of law as a factor in human civilization, with a strictly historical method including recourse to all available sources, and consideration of economic as well as sociological backgrounds. With a historical school in the modern-scientific sense, goes the historical method, and

[8] Ulrich Stutz, *Die kirchliche Rechtsgeschichte* (Bonn, 1905).

with the latter, critique of the sources.[9] In this respect the older historical school had deprived itself of important sources of knowledge and understanding by markedly neglecting the history of law in the Middle Ages and the modern period. In the field of Roman law its chief work was done on the *Corpus Juris,* in that of Germanic law it favored particularly the folk-laws of the earliest period.[10] The history of the "reception" of Roman law in the Middle Ages and its influence on the development of the European legal systems received recognition as an important subject of research only by the new German historical school, even though the latter still sinned enough by neglect.[10a] Yet it had been Savigny himself who in his voluminous and still not surpassed "*Geschichte des römischen Rechts im Mittelalter*" had in a measure deviated from the program of the historical school, and, on the other hand, had also grown beyond it.[11] It was left for

[9] Koschaker, *Die Krise des römischen Rechts,* p. 37; 23; cf. Erich Sachers, "Die historische Schule Savignys und das römische Recht," in *Atti del Congresso Internazionale di Diritto Romano,* Bologna, II (Pavia, 1935), 215-250; Claudius von Schwerin, in his review of Koschaker's book in *Deutsche Rechtswissenschaft,* IV (1939), 183, maintains that the historical school was basically unhistorical, "nicht nur ... infolge des Mangels an historischer Methode und Quellenkritik, sondern auch in ihrer Zielsetzung."

[10] Koschaker, pp. 23, 21 f. note 3.

[10a] Several essays on this problem appeared in *Atti del Congresso Internazionale di Diritto Romano,* Bologna II (Pavia, 1935); it is expressive that Ernst Rabel's article, "Die Rezeption des römischen Rechts in Deutschland" (pp. 185-190), offers no original research but merely a six page survey of older literature. On the problem, cf. also *infra,* under III note 12.

[11] Eduard Fueter, *Geschichte der neueren Historiographie* (third ed., Munich, 1936), p. 422: "Es ist charakteristisch, dass Savigny als Historiker nicht versucht, die Theorie vom Ursprunge des Rechtes aus dem Volksgeist an einem Beispiele nachzuweisen. Savigny setzt in seinem Werk [*Geschichte des römischen Rechts im Mittelalter,* 1815-1831] bloss die Tradition an die Stelle des Schaffens aus dem Nichts. Er schildert keinen mystischen Vorgang, sondern das Weiterleben eines ganz konkreten, kodifizierten Rechtes."—For the excellence of Savigny's work, see Hermann Kantorowicz, *The Law Quarterly Review,* LIII (1937), 339-343; especially p. 342: "I know of no other case, in modern times, where a scientific work, which was the first of its kind, was to remain a hundred years after its completion the standard work of a

the new German historical school to bring that original program into accord with the requirements of modern scholarship, and particularly to stress the necessity of the critical investigation of mediaeval law,[12] which bore scientifically fruitful consequences.

Historical jurisprudence and particularly research in mediaeval legal history thence gradually spread over nearly all Europe. A monograph on the influence exerted by the science of German legal history on the development of legal historical research in other countries should be well worth-while and would surely bring to light interesting results.[13] Within the limits of this essay it is of course impossible to dilate on this subject. To touch on just one point: It is well known that the English historical school was founded by Sir Henry Maine who, in a very real sense, was a follower of Savigny, though basically differing from the German historical school, and whose method was comparative and historical and much influenced by analytical jurisprudence.[14] One needs merely to mention names such as Sir Frederick Pollock, Frederick William Maitland, Sir Paul Vinogradoff, and Sir William S. Holdsworth,[15] to bring to mind the flourishing of the science of legal history in England. Correspondingly one can enumerate

whole vast subject.... Of course it could only be written by a trained jurist, but he had to be at the same time a great historian, a master of textual criticism, and a skilled paleographer."

[12] Cf. Landsberg, III, 1, 750, 772 ff. A bibliographical survey of the history of law in mediaeval Europe is found in Charles H. Haskins, *The Renaissance of the Twelfth Century* (Cambridge, Mass., 1927), p. 223.

[13] See bibliographical material on this problem in Richard Schröder and Eberhard von Künssberg, *Lehrbuch der deutschen Rechtsgeschichte* (seventh ed., Berlin and Leipzig, 1932), pp. 5-11, 1022-1026. One important chapter of this history has already been written with completeness and lucidity by Andreas B. Schwarz, "Einflüsse deutscher Zivilistik im Auslande" in *Symbolae Friburgenses in Honorem Ottonis Lenel* (Leipzig [1935], pp. 425-482; cf. also Max Gutzwiller, *Der Einfluss Savignys auf die Entwicklung des Internationalprivatrechts* (Freiburg i. Schweiz, 1923).

[14] R. Pound, *Encycl. of Social Sciences*, VIII, 480; cf. R. Pound, *The Spirit of the Common Law* (Boston, 1921), p. 153.

[15] See the pertinent biographical articles in the *Encycl. of Social Sciences*.

universally known scholars from most of the European countries where, in the second half of the nineteenth century, the like researches came into blossom: France (Fustel de Coulanges, Paul Viollet, Jean Baptiste Brissaud, R. Caillemer, Raymond Saleilles);[16] Holland (W. Modderman, S. J. Fockema-Andreae);[17] Switzerland (Andreas Heusler, Eugen Huber);[18] Spain (Eduardo de Hinojosa) where such researches had a relatively late start; and Italy which, through the school of Pietro Bonfante and above all through the most recent scientific undertakings of the Vatican, could even oust Germany from its lead in researches in the history of Roman law.[19] Hand in hand with the expansion in Europe went an internal strengthening of the science of legal history. The liberation from the shackles of the old historical school, which had led legal historical scholarship beyond the direct practical purpose of a better understanding of the existing law forward to historical understanding as an end in itself, enabled it to pass unweakened through the critical period of the first World War and the subsequent years of the general attack on historicism, although it played a diminished part in the university curricula.[20] In the decade and a half following the treaty of

[16] For general information regarding the various European countries, see note 13; in addition, Koschaker, p. 46 ff.

[17] P. van Heijnsbergen, *Geschiedenis der Rechtswetenschap in Nederland* (Amsterdam, 1925).

[18] Ulrich Stutz, "Die Schweiz in der deutschen Rechtsgeschichte," *Sitzungsberichte der Preussischen Akademie der Wissenschaften*, 1920, pp. 92-114.

[19] For details see Koschaker, pp. 46-49; Vratislav Bušek, *Studium práva církevního a jeho methody* (The Study of Canon Law and Its Methods; in Czech) (Bratislava, 1927), p. 30. Most impressive is the great number of collective volumes devoted exclusively to legal historical researches published in Italy during the last decade. Since 1935 a periodical for legal history, *Studia et Documenta Historiae et Juris*, has been published by the Vatican.

[20] The problem of teaching legal history in the law schools played a prominent role in the voluminous contemporary literature on the reform of legal instruction. A comprehensive survey of the problems as well as the important writings is found in Otakar Sommer, *Reforma právnických studií* (The Reform of Legal Instruction; in Czech) (Bratislava, 1925), pp. 53-64; cf. also Ernst Heymann, "Rechtslehre und Rechtsgeschichte," in *Festgabe für Otto*

Versailles, which brought to the lesser peoples of Europe fulfillment of the ideal of national independence, the science of legal history could make considerable gains, particularly in Eastern Europe. Carrying forward the older researches of Ignace Benedict Rakowiecki and Vaclav Alexander Maciejowski [21] scholars in Czechoslovakia, Poland and the Baltic states, in Roumania and Yugoslavia applied themselves to the cultivation of the history of law to an extent unprecedented in those countries.[22] In numerous universities chairs for legal history were established, periodicals founded, series of monographs published, congresses held.

In the homeland of the historical school of law the field had meanwhile been put under more intensive cultivation. The history of criminal, procedural and administrative law represented a new harvest of scholarship. Research opened up unexpected new domains in the laws of the ancient Orient,[23] an "Ancient Legal History" became materialized, and by

Liebmann (Berlin, 1920), pp. 297-312; O. Sommer, "Třetí říše a římské právo" (The Third Reich and Roman Law, in Czech), reprinted from the Anniversary Volume *Pocta k šedesátým narozeninám Dra. Alberta Miloty* (Prague, 1937); Koschaker, *Die Krise des römischen Rechts*, and Vratislav Bušek, *Studium práva církevního a jeho methody;* the latter two monographs include extensive bibliographies.

[21] Cf. Jan Adamus, "W. A. Maciejowski und das Programm der slavischen Rechtsgeschichte," *Przewodnik Historyczno-Prawny*, III (1933), 92-125.

[22] Several informative articles, many reviews and bibliographical material are found in *Przewodnik Historyczno-Prawny* (Legal History Review, in several languages), five volumes (Lwów, 1930-1937). Cf. also Rudolf Rauscher, *Několik úvah o programu a cílech slovanských právních dějin* (Considerations concerning the program and aim of the science of Slavic legal history; in Czech) (Bratislava, 1934); and the annual bibliographical surveys and reviews of Polish literature on legal history by Heinrich Felix Schmid in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, German. Abt., *Jahresberichte für deutsche Geschichte*, and *Jahrbücher für Kultur und Geschichte der Slaven;* Stanislas Kutrzeba, "L'histoire du droit et des institutions politiques de la Pologne: les traveaux des cinquante dernières années," *Revue historique de droit Français et étranger, Quatrième serie*, XVIII (1939), 58-88.

[23] Cf. Andreas B. Schwarz, "Pandektenwissenschaft und heutiges romanistisches Studium," reprinted from *Festgabe zum Schweizerischen Juristentag 1928* (Zürich, 1928), p. 26 f.

means of comparative investigations, the attempt was made to reach a synthesis of all systems of law throughout history, a universal history of law.[24] Ludwig Mitteis, Joseph Partsch, Paul Koschaker, Leopold Wenger here became the pioneers of a movement which, despite full recognition of the juridical factor, through its emphasis on the historical character of matter and method, assigned to legal history the rank of an indispensable component of the general history of civilization. This explains that legal history could not only hold its ground against countercurrents, the metaphysical and analytical jurisprudence of the ending nineteenth century as well as the social-philosophical and sociological jurisprudence of the twentieth century; it was even able to gain a further deepening of itself from these new orientations[25] and, more, offer valuable stimuli to the philosophic-sociological trends in jurisprudence. Again to mention only two examples. The method of Joseph Kohler, the leader of the neo-Hegelians, was historical and socio-philosophical. In his opinion any culture must shape the legal materials which have come down to it and is limited by those materials; he considered historical continuity a practical condition rather than a necessity. He thought of law as a product of the civilization of a people in the past and of attempts to adjust the results of that past civilization to the civilization of the present.[26] Kohler's grandiose researches in legal history and comparative law were guided by

[24] Julius G. Lautner, "Die Methoden einer antik-rechtsgeschichtlichen Forschung," *Zeitschrift für vergleichende Rechtswissenschhaft,* XLVII (1933), 27-76; Paul Koschaker, "Keilschriftrecht," *Zeitschrift der deutschen morgenländischen Gesellschaft,* LXXXIX (1935), 1-39; Leopold Wenger, "Ancient Legal History," in *Harvard Tercentenary Publications* (Cambridge, Mass., 1937); Koschaker, "L'histoire du droit, et le droit comparé surtout en Allemagne," *Recueil d'Études en l'honneur d'Edouard Lambert,* I (Paris, 1938), 274-283; cf. also article "Law" in *Encyclopaedia of the Social Sciences,* IX (1937), 202 ff.

[25] Cf. Karl Haff, "Rechtsgeschichte und Soziologie," *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte,* XXII (1929), 1-15; Ernst Heymann, "Rechtslehre und Rechtsgeschichte," *Festgabe für Otto Liebmann* (Berlin, 1920), p. 298.

[26] R. Pound, *Encycl. of Social Sciences,* VIII, 482.

this conception. Historical jurisprudence was modified in another way by Sir Paul Vinogradoff. Where the historical school saw in the history of law the unfolding of a single idea, he saw a succession of ideas, giving rise to a succession of types —the origin of law in totemistic society, tribal law, civic law or the law of the city-state, mediaeval law as a combination of canon and feudal law, individualist law and the beginnings of socialist law. The central point of his doctrine was his contention that historical types are the foundation of a theory of law. "Historical jurisprudence" he conceived to be "ideological jurisprudence."[27]

To some philosophers of law it may appear, as Dean Pound put it, that "for a time the place held by theology in the Middle Ages and occupied by reason in the seventeenth and eighteenth centuries was usurped by history." True, there can be no doubt that historicism was dominant in nineteenth century jurisprudence. Judgment of this historicism will differ according to whether one adheres to it or gives preference to one of the more modern conceptions. Having regard to the history of the sciences, however, it will have to be granted to the historical movement that it has rendered eminent and enduring services in the promotion of jurisprudence and the general history of civilization.[28] If this were ever challenged, the very existence of research in legal history and, even in a higher degree, its scholarly production will always give eloquent testimony to the indispensableness of this discipline in the *universitas litterarum*.

[27] R. Pound, *op. cit.*, p. 483; cf. William Seagle, *Encycl. of Social Sciences*, XV, 263 f.

[28] Cf. Landsberg, *Geschichte der deutschen Rechtswissenschhaft*, III, 1, 980 f.; Walther Schönfeld, "Puchta und Hegel," in *Rechtsidee und Staatsgedanke, Festgabe für Julius Binder* (Berlin, 1930), p. 40. Even Dean Pound, in his *The Spirit of the Common Law* (Boston, 1921), in emphasizing that "its exclusive reign [sc. of the historical school] in American juristic thought in the past fifty years brought out its worst side," did not fail to point out: "I would not be understood as denying or forgetting that this historical school did many great things for the science of law."

II

Ideological Bases and Present Organization of American Research [1]

So far only the development of the science of legal history in Europe has been considered. Let us now turn our eyes to America. Another hemisphere, another picture. It will need only a few strokes to sketch the historical background and the course of development. Two eminent scholars with profound knowledge of contemporary American law and the historical factors which had conditioned its growth, not long ago dealt *in extenso* with a special theme, Roman Law in the United States. Max Radin and Charles P. Sherman painstakingly investigated the influence of institutions of Roman law on American law from the colonial period to the present, and demonstrated the survival of ideas of Roman law in the American legal system, incidentally throwing light also on the history of legal education and the science of law in this country.[2]

Natural law was the very particular and peculiar product of the seventeenth and eighteenth centuries, the centuries in which the Eastern states of the United States were founded. There is clear reference to it in colonial discussion as well as in the obvious use of the terminology and the ideas of Natural Law. Since the Northern colonies were founded by zealous

[1] In preparing the following section of this essay the present writer was supported by information on various subjects received through the kindness of his fellow legal historians, Msgr. Francesco G. Lardone, Professors Brendan F. Brown, Stephen Kuttner, all of the Catholic University; Max Radin, of the University of California; and A. Arthur Schiller, of Columbia University; to all of whom he wishes to extend his sincere gratitude.

[2] Charles P. Sherman, "Roman Law in the United States of America," *Atti del Congresso Internazionale di Diritto Romano,* Bologna vol. II (Pavia, 1935), 321-341; Max Radin, "Roman Law in the United States," *ibidem,* 343-360. Cf. also Koschaker, *Die Krise des römischen Rechts,* p. 61 f. note 4. A brief history of the study of Roman law in the university law schools of the United States and Canada and its state in 1930/31 is presented by Lewis C. Cassidy, "The Teaching and Study of Roman Law in the United States," *Georgetown Law Journal,* XIX (1930/31), 297-305.

opponents of anything that savored of the Roman Church they took their Natural Law from Grotius and Pufendorf and thus opened the door wide to Roman Law tendencies. Through French and Spanish law, on the other hand, Roman law continued its practical validity and importance in Louisiana.[3] According to Radin's researches,[4] the law of the early American States was impregnated with Roman law influences, which naturally came also to the front in the textbooks of those days, especially those written by the first and much the most authoritative American jurist, Joseph Story.[5] During the early decades of the nineteenth century, books and pamphlets for the use of law students recommended the study of Roman law books; editions of Justinian's *Institutes* with notes and translation, editions of Heineccius, translations of Domat and of Pothier were published before 1830 and were in wide enough use among lawyers.[6]

This was the atmosphere from which necessarily the need of systematic training and scientific research in law, and particularly in legal history emerged. True, Roman law was first taught at Yale, as early as the end of the eighteenth century.[7] The doctrines of the German historical school, however, appear to have been introduced in this country in a course of lectures given by Luther S. Cushing at the Harvard Law School in 1849 and published in 1854.[8] Yet, Roman law studies,—characteristically,—were pushed into the domain of history and classical philology. James Hadley, a professor of Greek, taught Roman law at Yale College (1848-1872) and

[3] Cf. Sherman, *loc. cit.*, 326; R. Pound, *The Spirit of the Common Law* (Boston, 1921), p. 1; Koschaker, p. 61 note 4.

[4] Radin, *loc. cit.*, 348 f., 351.

[5] Cf. R. Pound, "The Place of Judge Story in the Making of American Law," *American Law Review*, XLVIII (1914), 693 f.

[6] Radin, 353.

[7] For details see Sherman, 326-329.

[8] Sherman, 327; R. Pound, *The Spirit of the Common Law*, p. 154; Kantorowicz, *The Law Quarterly Review*, LIII (1937), p. 333 and note 23.

composed a widely read text-book.[9] Neither he, nor another author of a text-book, Morey, instructor in ancient history, had any acquaintance with the enormous expansion of Roman law studies since the days of Niebuhr and Savigny. When after Savigny's death funds were raised all over the world for the great Savigny-Foundation for Research in Legal History, the largest contribution from outside of Germany and Austria came from South America; but none from the United States.[10]

The influence of the historical school did not become marked in America till after 1870, when American students had begun to go to Germany in increasing numbers and German ideas had taken root in American universities.[11] In this period Roman law studies came to be regarded as a subject of importance in all American law schools and flourished, for a certain time, particularly at the Yale Law School. At about the same time Henry Adams established at Harvard what has been called " the first historical seminar in the United States " to study early English legal institutions, and consequently, in 1876, the memorable *Essays in Anglo-Saxon Law* were published.[11a] Individual legal scholars found a special interest not only in the Roman law but in legal historical studies at large: Munroe Smith of Columbia, a pupil of Windscheid, Jhering and Gneist, of Stobbe and Brunner, Dean Pound at Harvard, a professed student of Rudolf Sohm, and Dean

[9] Radin, 358; Sherman, 327 f.

[10] G. Bruns, " Die Savigny-Stiftung," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, German. Abt., I (1880), VI.

[11] For this statement by Roscoe Pound, *The Spirit of the Common Law*, p. 154, however, accepted also by A. B. Schwarz, " Einflüsse deutscher Zivilistik im Auslande," p. 467, no specific documentary proof has been adduced. Unfortunately, no data on American students during the increasing influx of foreigners to the German law schools from the 1880ies on, are available. American students are not even listed separately in the otherwise informative study by Friedrich von Schulte, " Das juristische Studium auf den deutschen Universitäten," *Jahrbücher für Nationalökonomie und Statistik*, XII (1886), 315 ff.

[11a] Cf. C. W. David, "American Historiography of the Middle Ages, 1884-1934," *Speculum*, X (1935), p. 125 ff.

Wigmore at Northwestern, to mention merely the most prominent names. In his lectures and writings Munroe Smith's critical appreciations of detailed legal phenomena are synthesized by the conception that European legal history had a common, cultural evolution and did not consist merely of narrow national developments.[12] Dean Pound's writings on legal history and jurisprudence are so well-known and widely read that they need merely be recalled to mind.[13] This is also true of Dean Wigmore's *Panorama of the World's Legal Systems,*[14] a comprehensive survey of the legal development among all peoples on earth. Thus it is not to be wondered at that Sherman, indeed, speaks of "the present revival of Roman law study in the United States." And a recent visitor to this country, the eminent Vienna Romanist, Leopold Wenger, wrote only a short time ago a very enthusiastic essay on his impressions of the present state of Roman law study in the United States, which he considers to show a decisive upward trend: "History of Roman law and ancient legal his-

[12] Munroe Smith, *A General View of European Legal History and Other Papers* (New York, 1927); therein, pp. 256-268: "Roman Law in American Law Schools"; *The Development of European Law* (New York, 1928); "Die Aufgaben der römischen Rechtsgeschichte," in *Studien zur Erläuterung des bürgerlichen Rechts*, XVII (Breslau, 1906), 47-71, originally published in *Columbia Law Review*, IV (1904), 523 ff.; reprinted also in the first mentioned work.—On Smith, see Hessel E. Yntema, *Encyl. of the Social Sciences*, XIV (1937), 114 f.

[13] Roscoe Pound, *The Spirit of the Common Law* (Boston, 1921); *Interpretations of Legal History* (Cambridge, 1923); *Outlines of Lectures on Jurisprudence*, third ed. (Cambridge, 1920); "The Church in Legal History," in *Jubilee Law Lectures, School of Law, Catholic University of America* (Washington, D. C., 1939).—On Pound and his critique of the historical school, see the writings listed by Moses J. Aronson, "Tendencies in American Jurisprudence," *The University of Toronto Law Journal*, IV (1941), p. 100 note 26; cf. Franklin C. Setaro, *A Bibliography of the Writings of Roscoe Pound* (Cambridge, 1941).

[14] Three vols. (Saint Paul, 1928); Library Edition (Washington, D. C., 1936); cf. also Wigmore, *A Kaleidoscope of Justice* (Washington, D. C., 1941).—On Wigmore see Albert Kocourek, "John Henry Wigmore," *The Green Bag*, XXIV (1912), 3-8; *Journal of Criminal Law and Criminology*, XXXII (1941), 263-296.

tory are being well cared for in the United States" is Wenger's optimistic conclusion.[15]

Here our own criticism based on carefully established facts has to set in, *sine ira et studio*. It seems that the present writer is in an especially privileged position to give a true account and a correct evaluation of the facts. As an outside observer of legal history studies in this country for seven years, and as an American resident, the only obligation he feels is to share in the task of improving these studies, in place of the Austrian visitor's natural expression of courtesy and enthusiasm about matters as they are. As against some American scholars, on the other hand, he has the advantage of an almost twenty years' teaching activity in legal history in various law faculties of European universities and a thirty years' research experience, which are to be used as the propitious basis for the comparison of American with European standards. The optimism displayed by the writers mentioned is by no means without foundation with regard to Roman law, its teaching and its increasing appeal to American lawyers as of practical value. In this respect, the Riccobono Seminar

[15] Leopold Wenger, "Römisches Recht in Amerika," in *Studi di storia e diritto in onore di Enrico Besta*, I (Milan, 1939), 149-169. Justice Holmes' warning against "the menace of unimaginative historicism" escaped Wenger's attention: "We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present"; Holmes, *Collected Legal Papers* (New York, 1920), p. 50, quoted by Moses J. Aronson, "Tendencies in American Jurisprudence," *The University of Toronto Law Journal*, IV (1941), 94; Aronson, *Journal of Social Philosophy*, VI (1940), 54. Cf., on the other hand, Koschaker, more cautious and, perhaps, more correct, p. 62, n. 4: "Doch ist die Verwurzelung [namely, of Roman law in America] immer eine lockere gewesen und bis heute geblieben." One of America's leading historians, C. H. McIlwain, remarked in his "Legal History in American Colleges," in *American Law School Review*, vol. VII, No. 12 (May, 1934), pp. 1119-1121: "...we have been suffering for a long time on account of our neglect of Roman law, without which our knowledge of the two thousand years which lie immediately behind us, of their ecclesiastical and political institutions and ideas, can never be more than a mere smattering. Something should be done to counteract this short-sighted modern neglect. We must know the medium through which our civilization came if we are to understand ourselves or to insure our future."

of Roman Law is—beyond doubt—to be credited with the most important and successful pioneer work.[16] Concerning European legal history at large and for the research in mediaeval legal history in particular, the picture is quite different. By an authoritative American pen Legal History was recently well described as "standing in tattered clothes, quite hungry, unnoticed amid the otherwise impressive grandeur" of the magnificently equipped educational institutions in our country, "poverty amid plenty."[16a] While in presenting the historical development and the present state of legal science in the United States, it is unavoidable to touch also on the way it is taught; it must be pointed out, however, that the main concern of this paper is with research in mediaeval legal history and its promotion.

More than twenty-five years ago, prompted by the Carnegie Foundation for the Advancement of Teaching, the eminent legal scholar, Josef Redlich, then Professor at the Law Faculty of Vienna University and later connected with Harvard, made a very thorough-going and comprehensive study of legal education in the United States.[17] His excellent monograph on the subject is even today worth reading and highly informative. It includes, though only in a brief chapter, his careful observations and competent suggestions regarding American legal science in general. To refer to only

[16] Cf. Salvatore Riccobono, "Il Diritto Romano in America," and "Conferenze Washingtoniane del Riccobono Seminar of Roman Law della Catholic University of Washington," I-IV, in *Bullettino dell' Istituto di Diritto Romano 'Vittorio Scialoja'*, XLIII-XLVI (1936-1939); therein several articles on the teaching of Roman law and on the practical value of the study of Roman law; cf. also *The Jurist*, I (1941), 94-96; 189-192, 287-288.

[16a] Robert J. White, "Some Opportunities of the Catholic Historian in the Reform and Progress of the Law," *Catholic Historical Review*, XXI (1935-36), p. 49.

[17] Josef Redlich, "The Common Law and the Case Method in American University Law Schools," *Bulletin of the Carnegie Foundation for the Advancement of Teaching*, VIII (1914). Cf. also Dietrich Schindler, *Die Methode des Rechtsunterrichts in den Vereinigten Staaten von Amerika* (Zürich, 1924) who, however, did not touch on research activities.

one of his numerous important findings: in Redlich's opinion it is significant that, after the year 1870, it was the historical method, the creation of a new history of law, using in its investigations all modern scientific methods, which in England as well as in America changed the legal scholar from an industrious compiler of decisions and statutes into a scientific investigator in the full meaning of this word.[18] Meanwhile many of Professor Redlich's suggestions concerning legal education have materialized. Introductory lecture courses are now offered, which present the general basic ideas of law and the fundamental legal concepts and principles, considered both as products of a developing positive law and as influenced by the theories and ideas of legal philosophy. In other words, historical, philosophical, and sociological aspects of the law are now being emphasized in the teaching of American law schools. Special courses in Roman Law and English Legal History are being given, indeed, only in a few leading universities, and in the Catholic institutions the sources and history of Canon law are especially treated.[18a] Seminars and research courses in legal history figure in the programs of some law schools. All this is, beyond doubt, remarkable and would seem to hold out a happy prognosis for favorable further development.

A statistical inquiry, however, moderates expectations; for it reveals a far less favorable picture. In the Spring of 1941 a questionnaire was sent out to twenty-four important law schools in this country, requesting data on lecture courses,

[18] Redlich, p. 48 ff.

[18a] Courses in the history of Roman and Canon law are obligatory in Canon law schools, according to the Constitutio Apostolica "Deus Scientiarum Dominus" de universitatibus et facultatibus studiorum of May 24th, 1931—*Acta Apostolicae Sedis,* XXIII, 241-262—and the Ordinationes of June 12, 1931, issued thereon by the S. Congregatio de Seminariis et Studiorum Universitatibus—*AAS.*, XXIII, 263-284; among the *speciales disciplinae* the following are listed: diplomatica et palaeographia juridica, methodologia historico-juridica, epigraphia juridica, historia juris romani, historia diplomatiae ecclesiasticae. Since the academic year 1940/41 The Catholic University of America (School of Canon Law) has had a special chair for legal history.

seminars, and research work done in mediaeval legal history during the past ten years.[19] A supplementary question asked about publications in this field by faculty members or their graduate students. Some of the questionnaires were turned over by their original addressees to the history departments, on the ground of the possibility that work such as that in question might have been done there.

Here is the substance of the response to the inquiry. Lecture courses on mediaeval legal history and seminars were given in the Law Schools of Harvard, Columbia, Yale, California, The Catholic University, and Boston University. Courses or seminars on English-constitutional history were offered in the history departments of Northwestern, Johns Hopkins, Princeton, Missouri; such courses are probably also customary at other universities. The answers of the remaining fourteen law schools approached were negative in every respect. At best, "some incidental teaching of legal history" was reported. Another report reads: "Our excursions into legal history are sporadic and unorganized and have not led to formal publication at any time, during the last ten years." In only two letters did the writers feel the need of offering an explanation for the absence of studies in the history of law. The one coming from a Department of History points out that ". . . the students were seeking information about social

[19] This inquiry was occasioned by an invitation of Professor S. Harrison Thomson of the University of Colorado extended to this writer to prepare for its *Progress of Medieval and Renaissance Studies in the United States and Canada* a survey of American publications in legal history during the past ten years. This survey appeared in Bulletin No. 17 (1942) under the title "A Decade of American Research in Mediaeval Legal History." My sincere thanks are due to Professor S. H. Thomson for his aid in taking care of the relevant questionnaires. Almost all faculties and individuals approached promptly replied and thus put this author in debt to them. If in spite of all the present writer's endeavor and exactitude the results of this inquiry should show some shortcomings, not he, but the replying institutions and individuals should be held responsible for the data offered.—The results of a previous inquiry into the extent and character of teaching legal history in the American law schools were published by Orrin K. MacMurray, "The Teaching of Legal History in the American Law School," *American Law School Review*, vol. VII, No. 12 (May, 1934), pp. 1122-1123.

rather than legal problems." The other explanation is from the Dean of a law school which has excellent pioneer work in legal history to its credit and was once leading in this field. He writes: "There has been practically no work done in mediaeval legal history at this school recently. This is primarily due to the fact that the modern law is expanding so much and becoming so increasingly complex that the students here feel that they do not have enough time to study English legal history." This statement is clear, reasonable, and readily intelligible; the students have no time even for English legal history. Some other discerning scholars, too, exhibit concern about the fact that, "in the past ten years the interest in legal history has unfortunately declined rather than increased." It is also obvious that the existing training for scholarship and research work in the seminars must be affected by the factors of the kind mentioned. It can hardly be expected, therefore, that outstanding scholars in legal history would develop from instruction confined to a few hours' course during one year or restricted to "sporadic and unorganized excursions into legal history." Even the teachers' work in legal history has to face difficulties in cultivating this particular branch of legal science. They must also suffer from lack of time for their own historical researches. Moreover, printed aid for learning must be put into the hands of their students. Most recently, recourse has been taken to "case-books" on Roman law and on the development of legal institutions, designed on the pattern of the case-books for contemporary law.[20]

True, there are still some scholars of world reputation like Roscoe Pound and John H. Wigmore, eminent masters of legal research and of comparative legal theory, continuing their respective investigations. True, there are some outstanding names representative of a younger generation of scholars in the history of law such as Max Radin, and Charles P. Sherman in the field of Roman law; George L. Haskins,

[20] A. Arthur Schiller, *Texts and Commentary for the Study of Roman Law*, I (New York, 1936; mimeographed); Julius Goebel, Jr., *Cases and Materials on the Development of Legal Institutions* (New York, 1937).

G. E. Woodbine, and Julius Goebel in mediaeval law; of non-jurists like Charles McIlwain; to mention only the authors most familiar to the present writer. In the annual publication *Progress of Medieval and Renaissance Studies in the United States and Canada, Bulletin* no. 16 of 1941, among 723 medievalists listed eleven scholars described themselves as legal historians. Three of them appear among the names mentioned previously; only four have specialized in Continental or Church legal history, the rest designated the history of English law as their field of special interest. Although only very few publications on legal history are listed in the *Bulletin*, and not many more in the "List of Research Projects in History" of the *American Historical Review*,[21] quite a considerable number of high-quality monographs and essays has been produced during the last ten to fifteen years. A detailed account thereof was published elsewhere.[22] Naturally the history of English law is dominant, certain other fields are well cultivated, others more or less neglected. This writer's inquiry brought to light some important research projects now in progress, but not as yet listed elsewhere.[23]

The essays and articles on subjects of legal history are scattered through numerous periodicals very difficult to survey. They are found in various Law Journals, historical, philological, archeological, church-historical and other periodicals. No journal especially devoted to legal history exists in America, with the sole exception of the Bulletin of the Riccobono-Seminar for Roman Law, and even this was until recently published abroad. The scholar interested in legal history, who wishes to keep himself informed on the progress

[21] *American Historical Review*, Supplements to vol. XLV, no. 3 (1940), pp. 39, 59 f.; and to vol. XLVI, no. 3 (1941), p. 8.

[22] G. Kisch, "A Decade of American Research in Mediaeval Legal History", in *Progress of Medieval and Renaissance Studies, Bulletin*, no. 17 (1942), pp. 27-34.

[23] Professor Sveinbjorn Johnson of the University of Illinois is working on a translation of the ancient laws of Iceland, the Grágás (930-1262); Miss Shanks, formerly a research fellow of Johns Hopkins University, is at work on an Anglo-Norman law dictionary.

of research, finds no bibliographical guidance at his disposal. He must fall back on the *Continental Legal History Series* published from 1912 to 1928, and have recourse to the articles and reviews in the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* the *Tijdschrift voor Rechtsgeschiedenis,* and the *Revue Historique de Droit Français et Étranger.* There is, to the best of this writer's knowledge, only one series of monographs on legal history, seemingly specializing in English and American legal history.[24] Yet there is a Foundation for Research in Legal History, affiliated with Columbia University apparently specializing in the same field.[25] But with full appreciation of its efforts, it is not to be compared to the Selden-Society or even one of the once great Continental European Research Institutes for legal history.[26] Finally, not to be forgotten, excellent libraries of the rank of the Library of

[24] *Publications of the Foundation for Research in Legal History,* Columbia University, Law School; three volumes published so far: Julius Goebel, *Felony and Misdemeanor* (1937); Armand B. DuBois, *The English Business Company after the Bubble Act, 1720-1800* (1938); Shaw Livermore, *Early American Land Companies* (1939), a doctor's thesis, reviewed by Thomas P. Abernethy in *American Historical Review,* XLV (1940), 408-410.

[25] In addition to the publications mentioned in note 24, several works on English and American legal history are being written, according to Professor Julius Goebel of Columbia University. Detailed information concerning the structure and scientific aim and program of the afore-mentioned foundation was not, however, obtainable. No hint of them even is found in its initial publication, Goebel, *Felony and Misdemeanor.*

[26] See, e. g., on the Institute for Canon Law of Bonn and later of Berlin University: Ulrich Stutz, *Das kirchenrechtliche Seminar an der Rheinischen Friedrich-Wilhelms-Universität zu Bonn 1904-1917* (Bonn, 1920; privately published); U. Stutz, "Das kirchenrechtliche Institut an der Friedrich-Wilhelms-Universität in Berlin, 1917-1937", *Savigny-Zeitschrift für Rechtsgeschichte,* Kanon. Abt., XXVI (1937), 489-505; on the Research Institute for Legal History at Leipzig University: Guido Kisch, *Die Organisierung der Rechtswissenschaft* (Vienna, 1917); moreover, on the Berlin research institutes for international law: Max Rheinstein, "Comparative Law and Conflicts of Laws in Germany," *The University of Chicago Law Review,* II (1935), 244 ff.; Eduard Wahl, *Recueil Lambert,* I, 673 ff.—In continental Europe research in legal history was also promoted by the Academies of Science of Vienna, Berlin, Göttingen, Leipzig, which produced important publications of lasting value; finally, the *Monumenta Germaniae Historica* must not be forgotten.

Congress or Harvard Law Library have extensive and invaluable material, ready and waiting for the legal historian to work it up. Even important, yes unique, manuscript material of the Middle Ages dormant in public or private possession and scattered all over the country[27] awaits the investigator to be resuscitated to scientific life, for the enrichment of our knowledge of the legal past.

To sum up the present state of research in mediaeval legal history in the States: There is an abundance of resources for scientific work in legal history, both printed and manuscript material. Although in the twenty-seven years since Professor Redlich's investigations interest in historical studies has grown to a certain extent in the university law schools, its issue amounts to no more than a quite general historical orientation of the students in so far as needed and usable for a better understanding of the concepts and institutions of contemporary law. Only slow and modest progress is to be expected on this basis. Yet there will open up great opportunities and favorable chances for a tremendous upswing of research in the history of law in this country, if legal history will be cultivated, so to say, for the sake of legal history, in addition to its practical value for the study of contemporary law.

III

Legal History for the Sake of Legal History: Prospects and Suggestions

The bird's-eye view of the history of legal historical science and the summary description of the present state of research in legal history in our country as presented previously, in other words the historical and empirical discussions, must now be followed and supplemented by more theoretical and methodological consideration, in order to attain the positive standpoint needed to secure a solid basis for practical suggestions.

[27] Cf. Seymour de Ricci and W. J. Wilson, *Census of Medieval and Renaissance Manuscripts in the United States and Canada*, vols. I-III (Washington, D. C., 1934 ff.).

In this direction ground has already been broken by a member of the Harvard Law Faculty, Professor D. J. Boorstin, who very recently published in the *Harvard Law Review* an article " Tradition and Method in Legal History," as interesting as it is stimulating.[1] Its purpose is " to call attention to the problem of method, and to urge on the legal historian a greater self-consciousness." The author, occupying himself only with English and American history of law, makes two points on which he offers detailed and well supported elaboration: (1) Much of legal history has been and is being written by lawyers for lawyers; the subservience of legal historian to practicing lawyer[1a] leads one to believe that the legal past exists only for the convenience and cultivation of the practicing lawyer. (2) The adoption in literature of legal history of the categories and classifications of the modern "developed" legal system,[2] necessitated by this attitude, transformed legal history into a sort of legal embryology—a search for the rudimentary forms of the " full grown " legal system, the present becoming the culmination of all the past. Hence the writer on mediaeval legal history, for example, is less concerned with the adequacy of mediaeval legal devices to the peculiar social needs of their time than with the extent to which mediaeval notions are similar to those with which the modern lawyer is familiar.

No doubt, all this is sound and has been well demonstrated. But there are matters of even greater importance at stake, and causative factors involved, more deep-lying, than seems to be

[1] *Harvard Law Review*, LIV (January, 1941), 424-436. Boorstin's expositions are referred to, as a rule, in his own words.—Cf. also the address by Robert J. White, as excellent as it is impressive, quoted above in section II, note 16a.

[1a] For some restrictive remarks, see Boorstin, *loc. cit.*, p. 428, note 8.

[2] An interesting counterpart to the application of the classifications of the modern legal system to the material of legal history is the adoption of the historical classifications of the Pandects by the German Civil Code; cf. the criticism by Otto Gierke, *Der Entwurf eines bürgerlichen Gesetzbuchs und das deutsche Recht* (Leipzig, 1889), p. 80 ff.

brought out by Mr. Boorstin in his article. He refers indeed to legal historians of the calibre of John Reeves, Maine, Pollock and Maitland, or Holdsworth, but the fact confronting us is that a great deal of the contemporary "legal-historical" production as published in the Law Journals actually is concerned merely with legal embryology. Naturally any one-sided methodical approach to legal history is subject to justified reproach,—just as is the case in any other science. However, there is still a difference between the handling of legal embryology by lawyers with a profound first hand knowledge of the sources, as in the case of those masters of English legal history, and by lawyers who lay no claim to scholarship in legal history and have to rely on source material obtained at second hand. It is frequently employed by them only as an introductory embellishment, as a sort of historical support for the culminating phase in legal development. This can hardly be called even legal embryology. No original research in legal history is here embodied at all. The same is true of compilations of material from secondary sources on a given problem, institution or development, of legal history, designed to demonstrate "a similar development immediately relevant to common law." [3]

That differentiation, then, reveals the truism,—familiar to any legal historian in the word's true meaning,—that in the field of law, no less than in any domain of historical or other science, no research can claim the quality of scholarliness (*Wissenschaftlichkeit*), unless it is based on primary sources, whatsoever their character otherwise may be. This principle requires the strictest interpretation. Applied even to the work of an eminent jurist and scholar such as Dean Pound, whose admirable acquaintance with the original sources and a vast literature of legal history is evident from all his writings, this

[3] Such a presentation can be both interesting and useful for the American reader who either has no command of foreign languages or cannot spare the time for reading the secondary sources; but this, too, is far from any original research in legal history; e. g., the essay by Raoul Berger, "From Hostage to Contract," *Illinois Law Review*, XXXV (1940), 154-174, 281-292, from which the quotation in the text is taken.

means: he is concerned with "lawyers' philosophies of history" and the historical interpretation of jurisprudence rather than with creative research in legal history in the strict sense, here alone under consideration.

There is still another "danger-field" open through legal embryology, pointed out already by Mr. Boorstin. Standards of modern legal thought are often applied to categories or institutions of legal history; and the "legal historian" himself often seems unaware that he is asking whether a mediaeval institution was adequate to modern conditions.[4] This is evidently a diversion of the true meaning of legal history, of which even Savigny and his immediate successors were free, despite the limited scope of their program and of the inadequacy of their methodological approach to it. On the other hand, the great English historians of law—as demonstrated by Mr. Boorstin—did not always resist the temptation of applying modern legal standards in evaluating their historical material.[4a]

The moral drawn by Mr. Boorstin from his considerations is:[5] It is necessary to "shift away from that which makes legal history merely the handmaiden of natural law . . . Legal historians must constantly be aware that law itself is a part of

[4] On the danger of "hyperhermeneutics" see, more detailed, Guido Kisch, "The Jewry-Law of the Mediaeval German Law-Books," I, *Proceedings of the American Academy for Jewish Research*, VII (1936), 80-89; cf. G. Kisch, "Biblical Spirit in Mediaeval German Law," *Speculum*, XIV (1939), 45 f.—This danger is felt today even with regard to American legal history, as shown in Julius Goebel's Introduction to Shaw Livermore, *Early American Land Companies* (New York, 1939), p. VII: "The objectives of most legal historical inquiries are practical and for this reason are usually fixed by what is presently important. This concentration upon contemporary law frequently has the unfortunate effect of predetermining the range of inquiry and of permitting current opinion to creep back into times where it does not belong."

[4a] Cf. on the other hand, Professor F. M. Powicke's judgment on Paul Vinogradoff who "used fourteenth century legal terms as though he were a practicing lawyer of the time rather than an historical student living centuries later"; quoted by Frank I. Schechter, "Paul Vinogradoff—the Pontiff of Comparative Jurisprudence," *Illinois Law Review*, XXIV (1930), 533.

[5] Boorstin, *loc. cit.*, p. 434 ff.

history." It must be related to economic and intellectual history, for "legal history is a part of social history."

For those trained in legal history and approaching this dual scientific subject not as modern lawyers but as true historians of law, namely simultaneously as jurists and historians, this means breaking in an open door. From the point of view of modern scholarship, no province of legal history can be approached at all in a way different from that postulated by Mr. Boorstin.[6] Yet it is perhaps symptomatic that this stand had to be taken by a thoughtful member of the Harvard Law School, that the very attitude and method long universally recognized as alone appropriate to modern scientific standards in legal history, had to be recommended as the great potentiality of Anglo-American research in legal history.[7] The same

[6] To leave no doubt, it may be pointed out that this statement refers only to modern *research* in legal history, and therefore does not question the originality of Professor Boorstin's pedagogical experiment in conducting a seminar entitled "Problems in Legal History in Relations to Economic and Intellectual History"; Boorstin, *loc. cit.*, p. 434 note 20.—As to his proposition concerning "many unexplored possibilities" (p. 435), compare, for instance, the variety of topics of legal history as treated in the now one and a half hundred volumes of Gierke's *Untersuchungen zur deutschen Staats- und Rechtsgeschichte.*

[7] The diversity of the trends in the development of legal historical thought as conceived by philosophers of law and legal historians is interestingly illustrated by Mr. Boorstin's discussion of Sir William Holdsworth's statement on the "impossibility of gaining a complete grasp of the principles of English law without a study of their history" (Preface to the 1922 edition of Vol. I of Holdsworth's *History of English Law*); Boorstin, p. 425 note 3. It may be noted here, moreover, that it is erroneous to maintain, as Boorstin, p. 424 note 2, does, that "on the continent of Europe the Roman law tradition and the greater tendency for legal training to be considered a part of a general education have helped make legal history first a branch of history, and secondly a branch of law." The emphasis on Roman law had naturally furthered dogmaticism in legal history. Practically all professors of legal history in German universities, for example, were under the obligation to teach also modern law. In Europe the dual character of legal history, *qua* history as well as *qua* law, was always emphasized; and, therefore, scholarship in the history of law developed in general very happily. And it is true —which was perhaps, what Boorstin chiefly wished to point out—that legal history on the continent of Europe does not show the practical professional orientation of English legal history.

is true with regard to the postulate that legal history should be more concerned with searching for the functioning of legal ideas and institutions than for conceptual similarities.[8]

The aforementioned use of "case-books" for teaching legal history seems of no lesser symptomatic weight. True, Common Law is case law, its handling the practical calling for which the student demands preparation. From this point of view, then, the case method is demanded by the very nature of the common law. Not induction but empiricism is its characteristic feature.[9] On the other hand, the situation is quite different as far as legal history is concerned, no matter of what type. Classical Roman law, though, too, very casuistic, at its height developed,—as is well known,—a special literary type, the *Institutes* a comprehensive presentation of the elements of law. The fact that Justinian retained it as an introduction to his code shows clearly what importance was attached to it. The *Institutes* supplemented by a history of the Roman law and its sources remained the foundation of legal instruction in Europe throughout the nineteenth and in the twentieth century. On this basis all the great legal historians of the European continent and the American philosophers of law, almost all of whom enjoy a world reputation, received their training.[10] It is easily intelligible that the case-

[8] Cf. Karl Rothenbücher, *Über das Wesen des Geschichtlichen und die gesellschaftlichen Gebilde* (Tübingen, 1926), p. 129: "Die Werdensforschung ...lehrt uns nicht das Wesen, das Sein des Gegenstandes erkennen, sondern den Wandel des Gegenstands oder eigentlich die den Wandel bestimmenden Kräfte"; Karl Haff, "Rechtsgeschichte und Soziologie," *Viereljahrschrift für Sozial und Wirtschaftsgeschichte,* XXII (1929), 1-15; Hans Fehr, "Mehr Geistesgeschichte in der Rechtsgeschichte," *Deutsche Vierteljahrsschrift für Literaturwissenschaft und Geistesgeschichte,* V (1927), 1-8; Fehr, "Die neuen Aufgaben der Rechtsgeschichte," *Abendblatt der Frankfurter Zeitung* of January 10, 1924, p. 3.—H. D. Hazeltine, in *Encyclopaedia of the Social Sciences,* X (1937), 52, says of Frederick Maitland: "But more important even than his capacity to vitalize the past was the fact that he wrote legal history as intellectual history. To him the history of law was primarily the history of ideas..."

[9] Redlich, "The Common Law and the Case Method," pp. 37, 57; 41.

[10] Redlich, *loc. cit.,* p. 65, rightly points out: "What has qualified Pound and Wigmore for their deservedly valued and admirable achievements as

book method in its application to legal history,—and especially if not preceded by a systematic lecture course on legal history,—does not offer chances similarly favorable from the point of view of education for research in legal history. While its remaining pedagogical value must, by no means, be underestimated, yet one has to face the situation as it actually presents itself.

Put more explicitly and somewhat bluntly, all this means: From the instruction and research activities alone as found, for the time being, in most of the American university law schools, the science of legal history cannot expect profound or quick promotion. This statement does not imply any unfavorable criticism, but merely points out the actual state of the scientific configuration in this field. The preceding explanations endeavored to uncover the underlying causes, of which it is the natural outcome. On the whole, however, the picture, if viewed from another angle, is not as unfavorable, let alone even hopeless, as it may appear at first glance.

The European scholar is struck by the fact that, with certain exceptions such as Catholic philosophy, mediaeval studies were till recently comparatively neglected in the Western hemisphere, whereas other cultures quite remote both in time and space, have been accorded undiminishing general interest and scientific cultivation. Only in the last decade or two a more intensive interest in mediaeval and Renaissance researches has been awakened, the stimulus for which, however, was not supplied by legal history. The desire for a more intensive study of the Middle Ages originated rather from theology, philosophy, literature, art, political and economic history, and sociology. "This growing interest in mediaeval studies is a most welcome development, since it signifies that American scholars intend to participate more actively in the investigation of those momentous centuries whose traditions

legal writers and teachers is—apart, of course, from the personal talent of each—precisely that comprehensive outlook with which the deep understanding of the Roman law and of the modern codes of continental Europe, as well as their broad command of legal philosophy, has endowed them."

and creative achievements constitute the essential bases of much that is best in modern civilization."[11] In all the avenues of mediaeval culture, in religious as well as in the political, social, economic, intellectual and artistic life of this great epoch of human history, law as a paramount factor, played an important role. From such a deepened understanding issues a quite logical phenomenon: the appreciation of the share of law in the process of development of mediaeval culture. Through the interest in the history of ideas and intellectual interconnections in historical analysis, only very recently arisen, the desire for explanatory elucidations by researches in legal history is still further strengthened. To offer only a few examples of more recent date: On the program of the last Annual Meeting of the American Historical Association (December, 1940) appeared a paper "Mediaeval Representation and Roman Law," which demonstrated the fundamental importance of the extensive revival of the Roman and Canon law, in providing rationalization for the growing centralization of authority and, especially, of the formula *plena potestas* as an influence on the expansion of the feudal curia into an assembly of representatives which "enabled the ruler to bind the community to his will."[12] Similarly re-

[11] Martin R. P. McGuire, "Mediaeval Studies in America, A Challenge and An Opportunity for American Catholics," *Catholic Historical Review*, XXII (1936), 12 f., stressing the reach of interest in medieval research and at the same time the essential interrelation of all its branches. Cf. Guido Kisch, "Research in Mediaeval Legal History of the Jews," *Proceedings of the American Academy for Jewish Research*, VI (1934/35), p. 257 f. note 60.

[12] *American Historical Review*, XLVI (1941), 549. "In open discussion," the report adds, "it was emphasized that contemporary problems connected with taxation were more vital than Roman influences in the growth of medieval representation" (!!). The report left unmentioned the present writer's oral argumentation on the importance of the so-called "reception" of Roman law in the Middle Ages as a research subject. One segment of this vast problem was recently attacked in an original way by Myron P. Gilmore, *Argument from Roman Law in Political Thought 1200-1600* (*Harvard Historical Monographs*, XV; Cambridge, 1941). On its importance in general see, e. g., Koschaker, *Die Krise des römischen Rechts*, pp. 1-16; Charles H. Haskins, *The Renaissance of the Twelfth Century* (Cambridge, 1927), pp. 193-223; Paul Vinogradoff, *Roman Law in Medieval Europe*, second ed. (Oxford,

search in philology and literary history begins to include problems of the legal past.[13] Finally the growing number of articles in *Speculum* devoted to problems and institutions in the various legal systems of the Middle Ages is proof of the increasing understanding and appreciation of themes of this kind.

In other words, a need for research in legal history is felt in different departments of mediaeval studies. This seems to be the expression of a very legitimate desire to have legal history supplement or compensate for the existing insufficiencies in other branches of mediaeval scholarship. This truly scientific desire originating from within—a very favorable symptom—confirms and emphasizes the conception of legal history as an important and, indeed, indispensable element in the general history of human civilization.

This aspect, born of the practical considerations of modern American scholarship, opens up new and vital vistas for the future path of research in legal history. The watchword now must be: *legal history for the sake of legal history.* In America, too, just as in Europe several decades ago, the science of the history of law has outgrown its mere subservience to practiced law of immediate validity, which had perverted even the fundamental concept of the historical school of law. This does not mean, however, underestimating or even negating the practical value of legal history for the study or understanding of contemporary law.[14] It will always be duly appreciated as

1929), with bibliography; Woldemar Engelmann, *Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre* (Leipzig, 1938).

[13] Cf., in particular, the scholarly articles by J. R. Reinhard: "Setting Adrift in Mediaeval Law and Literature," *Publications of the Modern Language Association of America*, LVI (1941), 33-68; "Burning at the Stake in Mediaeval Law and Literature," *Speculum*, XVI (1941), 186-209.

[14] Franklin J. Russell, "The Practical Value of the Study of Roman Law," *Bulletino dell' Istituto di Diritto Romano 'Vittorio Scialoja,'* XLIV (1937), 445-450; Frederick J. de Sloovere, "Teaching Roman Law as a Basis for Comparative Law," *ibidem*, 463-474; cf. also *ibidem*, XLIII (1936), 327; 362. —It seems, however, appropriate to note the differing opinion of the outstanding American teacher of legal history, the late Professor Munroe Smith

an important instrument to arouse the student's interest in the history of law and, at the same time, not to let the study of it die down in the university law schools and other academic institutions. The future of legal history as an important branch of historical-juridical research, however, cannot be built alone on a foundation scientifically so weak.

Legal history must rather be cultivated for legal history's own sake. In this respect the war has offered America a great chance; and it seems quite possible that the current international situation will do more toward reorienting and promoting American research in legal history than any rational choice. Scholarship in legal history is rapidly going down in Europe with the destruction of the splendid temples of academic freedom, that once enjoyed world fame. The "leaders" did not give due heed to the warning uttered more than sixty years ago by one of the most famed German scientists, Hermann von Helmholtz, in his celebrated address on academic freedom: [15] "The eyes of the civilized world are on the German universities. Students of most diverse speech flock to them even from far distant countries. Such a position can be easily lost by one false step, but hardly regained." The harm done to European scholarship in legal history in the tyrannies is immeasurable, and in its ultimate results unpredictable. Yet so is also America's present opportunity. Research in legal history must be awakened, stimulated, and promoted, research centers must be created, to take over, continue and enlarge the lost European positions.

of Columbia University, as pointed out in his *A General View of European Legal History and Other Papers* (New York, 1927), p. 262: "To the lawyer who studies English legal history as an investigator, with the intent of increasing our stock of knowledge, a considerable acquaintance with ancient and mediaeval Roman law is necessary. But to the lawyer who studies English legal history merely to gain a better comprehension of the existing Anglo-American law, the Roman law, however useful, is not necessary;"... p. 264: "For the scientific study of law, some knowledge of the Roman law is absolutely necessary." Cf., similar doubts based on differing arguments as pointed out by F. P. W[alton], in *Journal of Comparative Legislation and International Law,* third series, vol. XIII (1931), 133.

[15] H. Helmholtz, *Über die akademische Freiheit der deutschen Universitäten* (Berlin, 1878), p. 7.

To come to more concrete individual proposals: (1) The Riccobono Seminar, which has already done important pioneering work in legal history and from its very beginning has not confined its program to Roman law alone, should now also officially extend the reach of its activities to all branches of legal history; (2) Ways and means should be found for publishing not only the summaries of the Seminar papers presented, but also reports *in extenso* of independent researches. If founding an American Journal for Legal History should appear unfeasible for the time being, would it not be a good idea to add to the four quarterly issues of THE JURIST a fifth issue, reserved solely for articles and reviews in all fields of legal historical research?

I do not dare, at present, to suggest the founding of an independent Institute for Research in Legal History, on the pattern which worked so successfully in Europe during the last decades, but with its own specifically American physiognomy.[16] This, I fear, must remain a somewhat remote goal; perhaps it will be attained some time through an organic development. But it should be possible in the near future to provide for a "Second Continental Legal History Series" just as recently a "Second Series of the Modern Philosophy of Law" has been initiated.

All efforts for the promotion of legal history hold out good promise, especially if the Riccobono-Seminar should give its endorsement to the proposals here set forth. Then the catholic mission of the Roman law as envisaged by Sherman, will become materialized: "Roman Law survived the deluge of the barbarian invasions which overwhelmed the Roman Empire; it furnished the light of progress in the darkness of the Medieval Ages; and it was revived and received with fervor and was studied as never before,—the effects of this revival

[16] The American scientific spirit was well discerned and duly appreciated by J. Huizinga, "Amerikanischer Geist," in his *Wege der Kulturgeschichte* (Munich, 1930), 365 ff.

have not yet passed away." [17] Such revived studies must necessarily lead back to Savigny, and by this very return supersede the historical school. History must be emphasized in the science of law. Not, however, in Savigny's own words, " to negate the value of other activities or trends, or even diminish, but because historical studies had been neglected for a long time and, therefore, temporarily needed a much stronger emphasis." [18] This emphasis adapted to the present time and situation, means: Legal history for the sake of legal history.

GUIDO KISCH

Formerly Professor of Legal History at the Universities of Leipzig, Koenigsberg, Prague, and Halle.

[17] Sherman, "Roman Law in the United States of America," p. 324. Cf. Andreas B. Schwarz, "Einflüsse deutscher Zivilistik im Auslande," *Symbolae Friburgenses in Honorem Ottonis Lenel* (Leipzig [1935]), p. 429: "Wo immer daher die Wissenschaft des römischen Rechts besonders aufblühte, dort entstand ein gemeinsamer Mittelpunkt aller Jurisprudenz. So strömte einst Jahrhunderte hindurch eine gemeinsam verbindende juristische Lehre aus den Hörsälen zu Bologna in die europäische Welt hinaus, und seither neigte der Schwerpunkt der Rechtswissenschaft in Europa dorthin, wo die Pflege des römischen Rechts in besonderer Blüte stand."

[18] Savigny, *System des heutigen Römischen Rechts*, I (Berlin, 1840), Preface, p. XIII.

COMMON LAW MARRIAGE IN RELATION TO THE CODE

THE canonical basis for this discussion is found primarily in the very familiar Canon 1099, not so much by reason of what it prescribes positively as because of what it does not say. After legislating precisely about the Catholic form of marriage and those bound to observe it, the Code enumerates the classes of persons who are not, as we say, "bound by the form": non-Catholics, whether baptized or not, if they contract marriage with non-Catholics, and children of non-Catholics, baptized in the Catholic Church but brought up from infancy outside the Church, whether in some heretical or schismatic sect or in a non-Christian religion or in no religion at all, when they contract marriage with a non-Catholic.[1] About these the Code says (Can. 1099 § 2): "*nullibi tenentur ad catholicam matrimonii formam servandam.*" Because of the way in which this law is phrased, the question arises as to what form, if any, such persons are to observe when they contract marriage. In answer to this question, canonists agree that a distinction must be made between baptized and unbaptized persons in this respect: if neither party has received the sacrament of baptism, their marriage is subject to the civil law, and they must observe, consequently, the law of the state regarding the form of marriage; if one or both have been validly baptized, the marriage is removed from the jurisdiction of the state and they are bound only by the natural law, which prescribes no special form; if the baptism of either or both is doubtful, it is presumed to be valid until the contrary is proved.

[1] For our present purposes, there is no need to take time to discuss the meaning of "ab acatholicis nati," since that has been determined by the responses of the Pontifical Commission for the Authentic Interpretation of the Canons of the New Code.

The matter, therefore, is clear in principle; the problem lies in the application of the principle to particular cases. Even there it would seem at first glance that there should be little practical difficulty: if neither was baptized, the case usually comes to our tribunals as one of the Pauline Privilege, and the question of form is of no practical importance; if one was baptized, generally it is a matter of dissolution of the marriage "in favorem fidei," in which again the form of marriage offers no obstacle; and if both were baptized the principle of Canon 1014 applies: "standum est pro valore." However, the matter is not always to be settled so simply; the conditions requisite for the application of the Pauline Privilege or the "in favorem fidei process" are not always verified, and Canon 1014 states the presumption in favor of validity but adds, "donec contrarium probetur," which admits the possibility of proof against the presumption. So cases arise from time to time for our adjudication. As one official aptly phrases it, "This office has periodical headaches because of common-law marriages among its clients."

Just to see the possibilities, suppose a Catholic wants to marry a non-Catholic, sufficient canonical reason to warrant a dispensation being present, but the non-Catholic party, unbaptized, has previously been married to an unbaptized person and their marriage has been declared invalid by a civil court because of lack of legal form. Or it was a so-called "common-law" marriage and there has been a divorce. How about the freedom to marry? Is there the impediment of *ligamen,* or not? Of what value is a civil declaration of nullity in such a case?

Or take this case: Bertha, baptized in infancy in the Lutheran sect, goes to live with Jacob, about whose baptism nothing can be learned with certainty. They never went through any marriage ceremony, and were not regarded by relatives as married. After some years Jacob abandons Bertha and begins living with another woman. Bertha is informed by a lawyer that no divorce or annulment is necessary, because there was no marriage. Bertha subsequently becomes a Cath-

olic and now wants to marry a Catholic man. Is she free to do so, or not? And is a solemn trial necessary to prove her freedom to marry? And so on.[2]

A very large proportion of the cases that come to our tribunals have to do with "defectus formae," because so many persons attempt marriage in violation of the law of the Church. Similarly, there is considerable disobedience of civil marriage laws in this country, if we are to judge by the number of reported cases and the great amount of legislation. Dr. Otto Koegel wrote a book in 1922 entitled *Common Law Marriage and Its Development in the United States.* He was led to this because of his work as counsel for the United States Veterans Bureau, in connection with the Bureau of War Risk Insurance. He says: [3]

> During the recent war the Bureau of War Risk Insurance had before it, perhaps, more cases of alleged common law marriage than are contained in all of the reports of adjudicated cases put together. . . . Men in the military and naval service . . . were compelled to make allotments from their pay to their wives and children unless good cause was shown for exemption. The Exemption Section of the Bureau of War Risk Insurance considered more than 100,000 claims for exemption from compulsory allotment, almost ten thousand of which were cases of married men who entered the service as single. Women claiming to be wives would file claim for family allowance and an investigation would be instituted. The writer had charge of these cases for a time and is in a position to say that by far the greater number of alleged marriages were meretricious relationships, for the convenience of the parties alone. . . . There was nearly always a ghost in the closet. . . . But, says the Supreme Court, a strong reason for upholding such marriages is to legitimate the

[2] Another canon applies to common law marriage between Catholics: Canon 1098, dealing with the contracting of marriage before witnesses alone, without the assistance of a priest, in cases of danger of death or when the prescriptions of Canons 1095 or 1096 cannot be followed without grave inconvenience and this state of affairs will continue for a month. There is some question also of its application to a mixed marriage.

[3] P. 101.

> offspring of many parents conscious of no violation of law. The first part of this statement expresses a noble sentiment but the latter part borders on the ridiculous. 'Many parents conscious of no violation of law', is a phrase which does not sound very well to one who has had actual experiences in the handling of many of these cases. . . . The great majority of common law marriages, so called, are not permanent unions. After a while the parties tire of each other and 'marry' some one else and have children.

We may reasonably infer, therefore, that, like ourselves, the civil courts have their troubles with "defectus formae" cases.

Now, what is a common law marriage? A nice simple question, indeed. But it reminds me of one of the late Father Bruneau's examinations in Dogma. At the end of second theology one year he came into the classroom to give the students the questions for their final examination. He stepped to the blackboard and wrote, "Cur crux?" And sat down, and said to the puzzled seminarians, "That's all. Go ahead!"

In order to understand common law marriage we must go back to the canon law as it existed before the council of Trent. It is well known that from the earliest times the Church required that for the lawful celebration of marriage there should be a public profession of consent and some ecclesiastical intervention. St. Ignatius writes: [4] "Decet vero, ut sponsi et sponsae de sententa episcopi coniugium faciant, ut nuptiae secundum Dominum sint, non secundum cupiditatem." And Tertullian: [5] "Penes nos occultae quoque coniunctiones, id est non prius apud ecclesiam professae, iuxta moechiam et fornicationem iudicari periclitantur." Nevertheless, up to the Council of Trent no substantial form was required by universal law for the validity of marriage. This was no doubt due to the influence of Roman law, in which various kinds of mar-

[4] *Ad Polycarpum*, c. V, 1.—Funk, *Patres Apostolici* (2. ed., 2 vols., Tubingae, 1901), I, 290; *MPG*, V, 724.

[5] *De Pudicitia*, 4.—Preuschen (2. Auflage, Tübingen, 1910), p. 24; *MPL*, II, 987.

riage were distinguished but no determined form prescribed as necessary for validity except perhaps the *confarreatio* or, later, *coemptio* for patricians, which had become obsolete even before the time of Justinian and had given way to the *liberum matrimonium,* or *matrimonium sine manu,* requiring only mutual consent. With the principle of "Nuptias non concubitus, sed consensus facit" in mind, and considering also the diversity of custom and ceremony in different countries, the Church did not insist on anything more for validity than the giving and accepting of mutual consent. Marriage contracted without the formal intervention of the Church was simply called clandestine,[6] and although illicit was valid. This, of course, is stated in the opening words of the "Tametsi" decree: "Tametsi dubitandum non est, clandestina matrimonia, libero contrahentium consensu facta, rata et vera esse matrimonia, quamdiu Ecclesia ea irrita non fecit . . . nihilominus sancta Dei Ecclesia ex iustissimis causis illa semper detestata est atque prohibuit."

As we all know, the "Tametsi" was of obligation only in places where it was published, and it was never promulgated in England. Moreover, the English common law required no special formalities, either ecclesiastical or civil, for the contracting of marriage. So it is generally stated by civil authors that the common law of England regarding marriage was the canon law as it existed prior to the Council of Trent. Here, then, is one element in the idea of common law marriage: it need not be solemnized before a priest or witnesses to be valid. In fact, the term "common law marriage" is used almost exclusively to denote a marriage that was not solemnized before

[6] Carberry: "Throughout the history of the Church the term 'clandestine marriage' has been used with more than one meaning. Sometimes it signified a marriage for which no evidence was available save the testimony of the parties; or a marriage contracted in the presence of witnesses, but not *in facie Ecclesiae*. After the IV Lateran Council (1215) a marriage was said to be clandestine, when the prescribed banns were not published. Later, after the Council of Trent, the term was applied to marriages contracted without the presence of a priest and witnesses, as had been decreed by that Council." —*The Juridical Form of Marriage*, n. 84, The Catholic University of America Canon Law Studies (Washington, D. C., 1934).

any official representative of the Church or of the State, in contrast to marriages that were so solemnized. Hence we find common law marriage described by the authors as " clandestine ", " irregular ", " informal ", " non-ceremonial ", or " marriage by consent only ". Koegel defines common law marriage as " a marriage which does not depend for its validity upon any religious or civil ceremony but is created by the consent of the parties as any other contract." [7]

The law of England to which reference has been made is of importance for this country because the common law of the United States touching marriage is the common law of England as it existed prior to 1754. Lord Hardwicke's Act (26 Geo. II c. 33) passed by Parliament in 1753, effective in 1754, required that all marriages, with a certain few exceptions, to be valid, must be celebrated in a parish church or public chapel of the Church of England. The exceptions specified marriages in Scotland, marriages of the royal family, those in which both parties were Quakers, those in which both parties were Jews, and all marriages solemnized beyond the seas. This last exception included the English colonies in America; so the special requirements of this law were never in force here. Lord Hardwicke's Act ended the possibility of common law marriages in England and Wales; so from that time on the common law marriage cases decided in English Courts concerned chiefly marriages contracted in Scotland—the famous Gretna Green marriages—or marriages entered into beyond the seas. Such cases as were decided, however, have had great influence in the jurisprudence of the United States. In the early days of this nation many marriages were entered into without special ceremony, because clergymen were few and travel was difficult. When such cases came before the American courts for adjudication, these courts, having little precedent to follow from local decisions, turned to the decisions of the English courts for guidance. This was only logical, since if the common law on marriage of this country was derived

[7] *Common Law Marriage and Its Development in the United States*, p. 7.

from the common law of England, the best interpretation of that law would be most likely to be found in decisions of the English courts.

The principal English cases that have affected the law in this country are: Dalrymple *v.* Dalrymple, of the Consistory Court of London (1811); Regina *v.* Millis, of the House of Lords Court (1843); and Beamish *v.* Beamish, House of Lords (1861). Of these a learned author says: [8] "In these three cases will be found all the learning upon the historical aspects of the question. The opinion in the Dalrymple case covers 249 pages and is one of the masterpieces of legal literature." It is very interesting to note this tribute to the Dalrymple decision, because it is a sentence of an ecclesiastical court—Anglican, it is true, but a court originally Catholic and in many respects holding to the tradition of Catholic canon law. (If 249 pages seems extraordinarily long for a sentence, consider Regina *v.* Millis, which covers 400 pages.) The Dalrymple case deals with a secret marriage contracted in Scotland, Regina *v.* Millis with a marriage of an Anglican and a Presbyterian before a Presbyterian minister in Ireland, and Beamish *v.* Beamish with the marriage of an Anglican minister and an Anglican woman in which the ceremony was performed by the bridegroom himself without witnesses. Of these, the Dalrymple case is the classic one on valid common law marriage. Without discussing it in any detail, we can say simply that it treats of the nature of matrimonial consent as required by the common law.

In common law marriage, the all important factor is consent; the manner of its expression is quite secondary.

The common law doctrine of matrimonial consent is derived directly from the canon law, but with some misinterpretation as might be expected. The doctrine stated in the Dalrymple case and that expounded by Pollock and Maitland in their

[8] Jacobs, *Cases on Domestic Relations* (Chicago, 1933), p. 367. Bishop says the Dalrymple decision is "a production of matchless beauty and learning, quite unsurpassed in forensic discussion."—Bishop, *Marriage, Divorce and Separation* (6. ed., 2 vols., Chicago, 1891), p. 170.

classical work on the *History of English Law* is thus summarized by Long: [9]

> From about the middle of the 12th century the marriage law of England was the canon law. By this law in its earlier form, while marriages in solemn form in church were known, mere informal consent was all that was necessary to constitute a valid marriage. For a time the doctrine prevailed that there was no marriage until the man and the woman became one flesh, and all that was essential was this physical union accompanied by the intent to be thenceforth husband and wife. During the 12th century, however, when the classical canon law was taking shape, a distinction arose between espousals or marriage *per verba de presenti* and marriage *per verba de futuro cum copula.* Two forms of marriage were recognized, a marriage by consent expressed in words of the present tense without any ceremony or physical consummation, and a marriage constituted by a promise to become husband and wife at some future time followed later by sexual intercourse. By such intercourse the previous promise was ripened into marriage. It was presumed that the parties at the time of such intercourse changed their previous words of future tense into a present consent to be immediately husband and wife. There were thus two kinds of marriage recognized by the canon law, which, though they differed in legal effect in some particulars, were substantially equivalent, and were both wholly informal.

This is not a correct summary of canonical teaching, but it represents the common understanding of the canon law doctrine by civil courts. Early in the last century Chancellor Kent enunciated the doctrine that a contract *per verba de praesenti* or *per verba de futuro cum copula* constituted marriage in New York. His teaching is now obsolete in many respects, but it did give a great impetus to the doctrine of common law marriage in this country. He says: [10]

> The consent of the parties is all that is required; and as marriage is said to be a contract *jure gentium,* that consent is all

[9] Long, *Domestic Relations* (3. ed., Indianapolis, 1923), p. 86.

[10] *Commentaries,* II, Lect. XXVI, p. 87.

> that is required by natural or public law. . . . If the contract be made *per verba de praesenti,* or if it be made *per verba de futuro,* and be followed by consummation, it amounts to a valid marriage, and which the parties cannot dissolve, and it is equally binding as if made *in facie ecclesiae.* . . . This is the doctrine of the common law, and also of the canon law . . . The only doubt entertained by the common law was, whether cohabitation was also necessary to give validity to the contract.

What the common lawyers refer to as the canon law is better known to us as the controversy between the school of Bologna (Gratianus and his followers) and the school of Paris (Peter Lombard and others). Gratianus, in the *Decretum* [11] defends what is known as the copula theory, according to which marriage entered into *per verba de praesenti* and not consummated is called *inchoatum, initiatum,* or *imperfectum,* and is regarded as not sacramental but dissoluble for any of various causes; it becomes a sacrament and is indissoluble only when copula has taken place, because then only does it completely signify the "quasi-corporal" union of Christ and the Church and become *matrimonium perfectum.* Because this theory is propounded in the *Decretum Gratiani,* common lawyers have taken it as canon law. The Parisian school of Peter Lombard, on the contrary, held that *matrimonium ratum et non consummatum* is both intrinsically and extrinsically indissoluble. The controversy was settled by Pope Alexander III, who formerly as Master Roland had been a follower of Gratianus. He set forth the true doctrine, rejecting the errors of both schools, declaring that *matrimonium ratum et non consummatum* is itself *perfectum coniugium* and sacramental, and yet not absolutely indissoluble, being capable of dissolution by solemn religious profession or by dispensation of the Roman Pontiff. The copula theory has been taught by canonists, but it has never been admitted by the Church, and cannot be said to be a part of the canon law.

The expression *sponsalia de praesenti,* of course, occurs in the Decretals in the sense of *matrimonium ratum et non con-*

[11] Q. 2, C. XXVII.

summatum; [12] likewise *sponsalia de futuro,* in the sense of betrothal or engagement, as the *sponsalia* of the Code. Alexander III, however, makes the distinction between them.[13] Furthermore, in the *Jus Decretalium* from *sponsalia de futuro* there arose a diriment impediment to marriage between either of the parties and blood relatives of the other,[14] but this was the impediment of *publica honestas* and not *ligamen,* with which it has at times apparently been confused by civil lawyers.[15]

However, so far as practical application in the law of this country is concerned, the statements of common law authors regarding the canon law of marriages *per verba de praesenti* or *per verba de futuro cum copula* are largely theory. As Koegel points out: [16] " The common law rule of marriage *per verba de futuro cum copula* is not law in any American state today." [17] Moreover, " There are but few cases in the reports where marriages *per verba de praesenti* without cohabitation have been sustained." [18] Long says: [19]

> On strictly legal principles, mere consent without consummation should be held to constitute a valid common law marriage. However, the weight of judicial opinion is probably opposed to this doctrine. In several states in which common law marriages are recognized the courts declare that marriage may

[12] C. 13, X, *de Praesumptionibus,* II, 23; c. 2, 5, X, *de sponsa duorum,* IV, 4; c. 22, 31, X, *de sponsalibus et matrimoniis,* IV, 1.

[13] Cf. Gasparri, *De Matrimonio* (ed. nova, Typis Polyglottis Vaticanis, 1932), n. 52; Cappello, *De Matrimonio* (Taurinorum Augustae: Marietti, 1933), n. 577.

[14] Cappello, *op. cit.,* n. 108; Wernz-Vidal, *Jus Matrimoniale* (Romae, 1925), n. 81.

[15] Cf. the Dalrymple case, and Swinburne, *Treatise of Spousals, passim.*

[16] *Op. cit.,* p. 105.

[17] Long, *op. cit.,* p. 92, says, " A marriage *per verba de futuro cum copula* was recognized in early Scotch and English law as a distinct type of marriage, but this was rather a rule of evidence than a rule of law. The intercourse does not make them husband and wife, but it affords evidence of a consent to marriage."

[18] Koegel, *op. cit.,* p. 131.

[19] Long, *op. cit.,* p. 107.

> be effected either as provided by statute or by mere consent followed by matrimonial cohabitation. And in these states it is common for the courts to speak of cohabitation as a necessary feature of a common law marriage.

He adds, as a practical note,

> Cases of bona fide informal marriages not followed by consummation or cohabitation must be among the rarest of human transactions.

Koegel is vehement against the doctrine of the necessity of cohabitation: [20]

> If only copula were required in addition to consent we would be recognizing the ancient doctrine maintained by Gratian and other canonists in force prior to the Lombardian distinctions and this would be difficult to defend on principle. The *dicta* of the cases go much farther, however. The cases purport to require cohabitation, which presupposes not one but perhaps many acts of copulation. A doctrine that requires two persons to fornicate a number of times before they create a legal status is absurd. Again, just where will the line be drawn? When do the parties cease to be fornicators and just when does the sublime institution of matrimony begin? If the idea of an informal marriage without cohabitation is undesirable doctrine, the remedy lies not in requiring cohabitation, but as a careful writer observes, " in the entire abrogation of the common law, a course that, in the present age, has something to commend it."

It must be borne in mind, however, that this insistence by the courts on cohabitation following consent is to a great extent by way of proof that the alleged marriage was actually formed. This fact Koegel clearly points out: [21]

> The difficulty a number of American courts have found with this question arises out of the fact that they confuse what is necessary to *create* an informal marriage with what is necessary

[20] *Op. cit.*, p. 128.

[21] *Op. cit.*, p. 131.

to *prove* the marriage. So in spite of the *dicta* of many courts we can still say that a present consent is sufficient to effect a common law marriage, quite apart from any cohabitation.

The same is true of the element of habit and repute, sometimes mentioned by courts as a way of effecting a common law marriage. Without consent, habit and repute cannot form a marriage; they merely constitute a means of proving its existence.

Before concluding this summary, some mention should be made of other occasionally occurring factors affecting the formation of a common law marriage. It is said that the consent must be given "*per verba de praesenti*". It appears, however, that although the "*de praesenti*" is essential, the "*verba*", in the sense of words spoken by the parties in the presence of each other, are not essential. Consent can be given by signs, by written agreement, by letter, by proxy, and possibly, though doubtfully, by telephone. "*Verba*", consequently, is to be understood in the broad sense as including within its meaning also equivalent signs. The essential element is that, as in any contract, there must be a "meeting of minds" specifically giving and accepting present matrimonial consent to each other. In this respect, consent as understood by the common law does not differ from the definition given by the Code in Canon 1081.

Regarding convalidation, however, the common law differs radically from the canon law. The Code requires a renewal of consent in case of a marriage originally invalid by reason of a diriment impediment, except in case of a *sanatio in radice*, and this renewal of consent supposes a new act of the will and knowledge of the nullity of the prior consent. In the common law, and by statutory law in many states, a marriage originally invalid becomes valid when the impediment ceases, provided the parties continue to cohabit together. This is acceptable doctrine, because the renewal of consent required by the Code is *jure ecclesiastico*, as Canon 1133 states, and is not necessary by natural law. There is a famous American case in point, Travers *v.* Reinhart (205 U. S. 423), in which a man and

woman went through a marriage ceremony which was void in Virginia. They moved to Maryland, where common law marriages are not recognized as valid, and lived there 15 years. They then moved to New Jersey, in which common law marriages are recognized as valid, and after six months the man died. The court held that the marriage was valid, having become so by their cohabitation in New Jersey.[22] This decision has been frequently cited and may be accepted as sound common law doctrine.

Finally, it must be borne in mind that the common law doctrine of marriage does not apply all over the United States. In fact, common law marriage is held to be valid in less than half of the American jurisdictions—24 out of 53[23]—and in only 7 of these is it so by statutory law. The tendency is to legislate against its validity; so the number of states in which it can be contracted validly (by civil law) is decreasing. Most jurisdictions and many authors are inclined to endorse the opinion regarding such unions that was expressed by the Council of Trent.

To summarize: While the term "common law marriage" technically includes all marriages recognized as valid by the common law, whether contracted in religious or civil ceremony or informally by private exchange of consent, it is used almost

[22] Koegel (*op. cit.*, p. 160): "On principle the time element should not enter into the question. The rule is that if the parties enter into what, by the law of the place, is a marriage, whether they be there transiently or permanently, they are married. Therefore, if the mere continued cohabitation after the removal of the impediment to a valid ceremonial marriage constitutes a valid common law marriage, it would seem that if the parties desire and intend matrimony and merely pass through a jurisdiction recognizing common law marriage, a valid common law marriage would be created by the mere fact that they went through such jurisdiction, even perhaps on a sleeping car, without ever knowing it."

[23] In addition to the 48 States, we include Alaska, Canal Zone, District of Columbia, Hawaii, and Puerto Rico. Common law marriage is declared valid by statute in Idaho, Mississippi, Montana, New Jersey, New Mexico, South Carolina, and South Dakota. It is held to be valid by court decisions in the following: Alabama, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Michigan, Minnesota, Nevada, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Wyoming, and District of Columbia.

exclusively with reference to marriages contracted without a legally authorized ecclesiastical or civil ceremony. The presence of no third person is necessary for its formation, though this may at times be needed for proof before a court.

The consent must be truly matrimonial, expressed to each other by both parties in terms of the present tense, not future or in mere acknowledgment of a past action. And for the sake of clarity we may add that the consent must be freely and seriously given by parties capable of contracting marriage. Cohabitation is not *per se* essential, though generally insisted upon by the courts as necessary evidence of serious intention to contract marriage. But since common law marriage without any cohabitation or consummation is extremely rare, in practice this point offers no special difficulty. And when genuine consent was mutually exchanged but the marriage was originally invalid by reason of some impediment, convalidation is effected by continued free cohabitation, without the necessity of a renewal of consent by a new act of the will. On the other hand, mere cohabitation without genuine matrimonial consent is insufficient to constitute common law marriage, although such unions are frequently loosely referred to as such. True matrimonial consent is essential for any marriage, no less for common law marriage than for any other type.

In conclusion: Where common law marriage is invalid by the law of the state, unbaptized persons contracting marriage with each other are bound to observe the statutory formalities required by the law of the place of contract. If they fail to do so, the civil authority has the right, *ex jure devolutivo,* to adjudicate the case. Such is the opinion of such eminent canonists as Wernz, Cappello, Vidal, Gasparri, Billot, and many others. The opinion expressed in Wernz-Vidal[24] may be safely followed in practice: "Nihil quoque obstat, quominus causae matrimoniales illorum infidelium, qui cum infidelibus sponsalia contrahunt vel nuptias celebrant vel iam celebrarunt, a iudicibus fori saecularis definiantur, salva tamen

[24] *Jus Matrimoniale,* pp. 80, 81.

competentia fori ecclesiastici in causis matrimonialibus, si unus ex coniugibus esset baptizatus."

Where common law marriage is valid, there is little if any distinction to be made between baptized and unbaptized persons in respect to the essential form of marriage, since the requirements of the common law are essentially the same as those of the natural law, as interpreted by the canon law. Practically speaking, the decisions of the S. R. Rota dealing with cases of consent will be our best guide in cases dealing with such marriages.

Although marriage by the common law or by the natural law is easily effected, we should hesitate to accept indiscriminately as genuine marriage any and all cohabitation by persons free to contract in this way. Experience has shown that many, if not most, of these unions are a mere living together in concubinage without any real matrimonial intent. It is hardly fitting that we should without distinction dignify such sinful relationships by considering them on the same plane with the holy estate of matrimony as instituted by Almighty God. True, "*nemo praesumitur malus*," but on the other hand neither is there any legal presumption requiring us to uphold as valid marriage a mere cohabitation between unmarried persons. In fact, the absence of any public formality without adequate reason to justify its neglect offers a sound argument against the existence of true intent to contract marriage. In such a case as that of Bertha and Jacob described in the beginning of this paper, my opinion is that the union is by no means matrimonial but simply a deliberate living together in concubinage, that Bertha is free to contract a valid marriage and that her freedom can be established by a simple investigation such as is usual in "defectus formae" cases without any need for the formality of a solemn trial.

The question as to when a solemn trial may be necessary in cases of common law or natural law marriages that properly come to us for adjudication, together with other questions perhaps not satisfactorily answered in this presentation, I prefer to leave open for discussion by others.

C. Bernard Alford, J.C.D.

Albany, N. Y.

BINATION ACCORDING TO CANON 806, § 1— A CASE OF NECESSITY OR A PRIVILEGE OF CONVENIENCE?

(*Continued from the April Number*)

II. Bination is not a Privilege of Convenience

A PRIVILEGE is considered as a private law or a special favor granted to some persons by a legitimate superior *contra* vel *praeter* the common law.[1]

It is defined as "*a private law*", because it is not granted indiscriminately to all persons who are obliged to abide by the common law, but only to a certain person or persons by a positive concession of a legitimate superior. It is within the concept of law, because it is a *norm* according to which somebody may, with the authorization of a legitimate superior, act permanently *contra* vel *praeter* the rules laid down in common law. A privilege, then, although it does not necessarily enjoy perpetuity, is a permanent norm due to the fact that it is not limited to one or several passing acts, but must be conceived as a favor granted with some stability within the limits indicated by a legitimate superior.[2]

Only a legitimate superior may grant a privilege either himself or through one to whom he has delegated his power.[3]

A privilege is not to be confused with a dispensation or what is generally called an indult or "*a faculty*".

A dispensation in canon law is defined "a relaxation of the law in a special case".[4]

An indult is generally defined as a concession or permission,[5]

[1] Vermeersch-Creusen, *Epitome iuris canonici*, I (4. ed. 1929), n. 149.

[2] Noldin-Schmitt, *Summa theologiae moralis*, I (20. ed., 1929), n. 192.

[3] Can. 199, § 1, § 2.

[4] Can. 80: "Dispensatio, seu legis in casu speciali relaxatio. . . ."

[5] Forcellini, *Totius latinitatis lexicon*, v. *indulgeo, indultum*: "Indultum est concessio, permissio . . . Iuxta Constantinianae legis indultum. Indultum principis. Cod. Theod. 4. 15. 1. *Ibid.* 3. 10. 1."

v. g., an indult of exclaustration or secularization granted to a religious to live outside of his community.[6]

"*A faculty*" as conceived in our American ecclesiastical law and in conformity with the general principles of canon law may be defined as a permission given by a lawful superior to certain persons to perform certain acts within the limits and restrictions of the power entrusted to them.[7] Quite often it is defined by some old authors[8] as a "*facilitas agendi*", although there also is a distinction between *faculty* and *facility*.[9]

In our case, a priest may receive from his Ordinary the usual or ordinary faculties according to the common law[10] and also some extraordinary faculties which the Bishop grants in virtue of an indult obtained by him from the Apostolic See[11] in which the faculty of subdelegation is expressly mentioned.[12] In some cases, however, a subdelegation is purposely forbidden.[13]

Convenience is defined as "that which gives ease or comfort; ease; anything handy or labor-saving; suitable, commodious, favorable."[14]

[6] Can. 638: "Indultum manendi extra claustra. . . ."

[7] This is the case with the "Quinquennales Ordinariorum locorum facultates," where the term "faculty" is used and no other. Cf. Vermeersch-Creusen, *Epitome*, II, nn. 813, 814, Appendices.

[8] Forcellini, v. *facultas*: "Proprie est facultas agendi . . . Hinc omnis ars facultas appellatur, quia dat regulas et rationem aliquid faciendi . . . Facultates sunt, aut quibus facilius fit, aut sine quibus aliquid confici non potest. . . ."

[9] Forcellini, v. *facilitas*: "Inter facilitatem et facultatem hoc discrimen agnoscit *Fest.* apud *Paul. Diac.* p. 65. Lind. '*Facul* Antiqui dicebant et *faculter* pro facile, unde *facultas* et *difficultas* videntur dicta. Sed postea *facilitas* morum facta est, *facultas* rerum . . . Facultas locupletis, facilitas artificis est. . . .'"

[10] Also called the "Faculties of the Diocese".

[11] For instance to absolve from reserved cases; to act in marriage cases in virtue of the "Quinquennales".

[12] Cf. Caput I. Facultates ordinis generalis. 1. Facultas visitandi, sive per se sive per ecclesiasticum virum probitate. . . .

[13] "Facultas (per ipsos Ordinarios exercenda ac proin nemini subdeleganda) ad tempus . . . Facultates Supremae Congr. S. Officii, I."

[14] The Practical Standard Dictionary (New York, Funk & Wagnalls, 1929).

Convenience, then, excludes necessity and vice versa; these two terms are antonyms. A factor may be necessary in a twofold manner: *absolutely necessary,* when it is essential to accomplish a desired result; in our case, the presence of a priest duly ordained to offer up holy Mass; *relatively necessary,* when the accomplishment of a desired act is dependent on a condition which, however, may be supplied by an equivalent factor or element; in our case, bination is relatively necessary based on the fact or condition that another priest cannot be supplied to take care of the second Mass in a church.[15]

In view of these facts, then, bination is not a privilege or a convenience according to the intention of the supreme lawgiver. It is not a privilege, because there is nowhere a mention of a privilege.

1) Not in the Code of canon law. Let us attentively look at canon 806, § 1: "Excepto die Nativitatis Domini et die Commemorationis omnium fidelium defunctorum, quibus facultas est ter offerendi Eucharisticum Sacrificium, non licet sacerdoti plures in die celebrare Missas, nisi ex apostolico indulto aut potestate facta a loci Ordinario".

We note the words: *facultas, non licet,* nisi ex apostolico *indulto,* which again signifies *concession, permission;* therefore there is no room for a privilege of convenience which one could use arbitrarily, optionally, at his choice, *ad libitum.* We have to take the words of the supreme lawgiver of the Church as they are in the text, context and parallel references,[16] and invoke the well-known adage: "*Quidquid legislator voluit, expressit; quod noluit, tacuit*". In the text, he expresses only: faculty, permission, concession, but is entirely silent about the word "privilege".

Neither does the context allow any privilege of convenience as is evident from the words that follow in canon 806, § 2:

[15] Other scholastic divisions and subdivisions are purposely herein omitted, v. g. *necessitate medii, praecepti,* etc.

[16] See canon 18.

§ 2: "Hanc tamen facultatem impertiri nequit Ordinarius, nisi cum, prudenti ipsius iudicio, propter penuriam sacerdotum die festo de praecepto notabilis fidelium pars Missae adstare non possit. . . ."

Again the lawgiver expressly omits the term "privilege" and uses the word "faculty" purposely so as to eliminate every possible doubt as to the use of bination. Moreover, he makes the permission to binate dependent on three conditions: 1) on the prudent judgment of the Ordinary; 2) on the *penuria sacerdotum;* 3) on the fact that a notable part of the faithful could not otherwise assist at holy Mass. And let us also note that these three conditions are likewise framed into the law of bination concurrently and dependently on the condition "*nisi cum*", because there are no other alternatives of "*vel*" or "*aut*" inserted into the reading of this entire paragraph. That the particle "*nisi*" is essential in a condition is also evident from canon 39: "Conditiones in rescriptis tunc tantum essentiales pro eorumdem validitate censentur, cum per particulas *si, dummodo,* vel aliam eiusdem significationis exprimuntur". What we have to stress especially in our case is the *penuria sacerdotum.* Therefore, whenever there is a sufficient number of other priests available who may take care of the scheduled number of Masses in a parish church, as is the case in a religious community whose monastery is connected with a parish church, there is, and can be, no room for bination.

2) The foregoing conclusion is evident from the previous sources on which canon 806, § 1 is based. a) Pope Benedict XIV [17] is clear on this matter when he approves a commentary of Pasqualigus: "Si in aliquo oppido sit unus tantum sacerdos, qui teneatur celebrare diebus festis, et adsint alii simplices sacerdotes, poterit Episcopus eos cogere ad celebrandum diebus festis. Ratio est, quia adest indigentia populi, eo quod difficile sit, quod omnes eadem hora conveniant ad audiendam Missam; et ideo cum sacerdotes habeant

[17] Benedictus XIV, ep. "*Declarasti*", 16 mart. 1746—*Fontes iuris canonici,* n. 365.

ratione Ordinis munus sibi addictum populo, poterit Episcopus eos cogere, ut impendant officium suum populo, offerendo Sacrificium, ut absque difficultate possit adimplere praeceptum audiendi Sacrum. In tali tamen casu tenebitur populus aliquid contribuere iis sacerdotibus pro sustentatione; quia, cum ministrent populo, aequum est, quod accipient aliquid pro sustentatione ".[18]

In the very same document there was also treated a question of extending the privilege of saying three Masses on All Souls' Day so that not only religious, but also all secular priests could offer three Masses that year on this day. From the context it is evident that this privilege had been refused.[19]

b) Benedict XIV again writes on this matter: " Porro si denegatum fuit Episcopo petitum privilegium celebrandi bis in die festo, ut Nobiles satisfacerent praecepto audiendi Missam, eo quod alius aderat sacerdos, qui Sacrum facere poterat; si principum virorum vota exaudita non fuerunt, qui tantum pro extensione privilegii precabantur, et talis privilegii, quod unicam tantum diem quolibet anno respiciebat: unusquisque facili negotio cognoscere poterit, quid a Sede Apostolica factum esset, si simplices parochi facultatem petiissent bis celebrandi, ubi alius non deesset sacerdos, qui parocho operam suam praestare posset, et bis celebrandi, non unica die intra annum, sed tot diebus, quot per anni cursum dies celebrandi fidelibus praecipiuntur ".[20]

c) In an encyclical letter,[21] Pope Benedict XIV again stresses the conditions, *the lack of a sufficient number of priests and the existing necessity of bination for the people*: " Inter ceteras illa adnumeratur facultas, per quam copia fit sacerdoti bis Sacrum peragendi uno eodemque die, licet id expresse prohibeatur capit. *Consuluisti, de celebratione Missarum;* cui tamen derogatur ob necessariam causam, videlicet ob sacer-

[18] *Ibid.*, § 16.

[19] *Ibid.*, § 26.

[20] *Ibid.*, § 27.

[21] Benedictus XIV, ep. encycl. "*Apostolicum ministerium*", 30 maii 1753—*Fontes iuris canonici*, n. 425.

dotum paucitatem, vel cum eorum numerus, qui diebus festis tenentur sacris assistere, talem exhibeat necessitatem, ut, nisi alicui sacerdoti duas Missas eodem die celebrandi potestas concedatur, Ecclesiae mandato plures non satisfacerent . . ." [22]

d) Benedict XIV also stresses the point that the faculty of bination, granted to a priest, cannot be considered as a privilege but a concession limited to a case of necessity: "Certum quoque est, facultates eiusmodi, nisi id necessitas postulet, nunquam concedi; vel, si quando concedantur, non haberi tamquam alicuius sacerdotis privilegium, sed tantum ob causam peculiarem necessitatis. . . ." [23]

From all these foregoing quotations, therefore, it is evident that bination is a concession restricted to a case of necessity only and cannot be considered as a privilege of convenience.

e) Besides the above alleged quotations from Benedict XIV, there are fourteen other documents issued by the various Roman Sacred Congregations. Due to the fact, however, that they all repeat the same peculiar legislation on bination, using even the identical words, they are herein purposely omitted,[24] excepting two resolutions of the Sacred Congregation of the Council. According to the tenor of the first inquiry by an Archbishop, the question was: "Whether he could permit the pastors in his archdiocese to binate in case they have two parishes?" The Sacred Congregation answered: "There is no room for the faculty of bination, unless due to the lack of clergy, there is no other priest who could celebrate and apply the Mass for the people".[25] The other question was asked again by a Bishop: "Is the Bishop allowed to give permission of bination to a priest to say one Mass in an oratory of the suburb or out in the country, and to say the other Mass in the

[22] *Ibid.*, § 11.

[23] Benedictus XIV, ep. "*Declarasti*", 16 mart. 1746, § 21—*Fontes iuris canonici*, n. 365.

[24] See footnotes to can. 806, § 1-2.

[25] S. C. C., *Lancianen.*, 3 febr. 1884—*Fontes*, n. 4261: "Ad 2. Non esse locum facultati Missas iterandi, nisi cum ex Cleri deficientia alius sacerdos non adsit, qui parochi loco celebrare et applicare possit".

city or in a place where there are also other priests saying Mass?" The Sacred Congregation of the Council answered: "He is not allowed, and the Ordinary, whenever he judges that it is necessary to binate in some of the stated cases, should have recourse to the Holy See".[26]

And there is also a peculiar case recorded in the *Acta Apostolicae Sedis*. The Sacred Congregation de Propaganda Fide had been asked for the extension of the Apostolic Constitution "*Incruentum*" in behalf of the Oriental Church so that all priests belonging to the oriental rite likewise could say three Masses on All Souls' Day. The Sacred Congregation, however, refused it.[27]

From all the above stated quotations it is evident that the Apostolic See does not so easily grant the faculty of bination, unless necessity calls for it according to the prudent judgment of a Bishop. Nowhere does the permission to binate obtain the name of a privilege of convenience, but in all the respective documents referring to bination, it is simply called "*faculty*", "*permission*", and as such is purposely inserted into can. 806, § 2.

III. Bination According to Canon 806, § 2 When Licit?

The faculty of bination is not to be given by Ordinaries indiscriminately to all their priests as a personal privilege which they may use at their choice, because the opening words of paragraph 2 of canon 806 contain a prohibitive clause "Hanc tamen facultatem *impertiri nequit Ordinarius*", based on the following restrictive conditions: 1) a prudent judgment of the Bishop whether or not bination is necessary in this or that church, parish or place; 2) a lack of priests (*propter penuriam sacerdotum*); 3) the fact that a notable part of the faithful could not assist otherwise at holy Mass on Sundays or holydays of precept (*die festo de praecepto notabilis fidelium pars Missae adstare non possit*).

[26] S. C. C., *Malacitana*, 10 maii 1897—*Fontes*, n. 4303.

[27] S. C. de Prop. Fide, 22 mart. 1916—*A.A.S.*, VIII (1916), 104, 105.

It is also noteworthy to state that all these three conditions are based on the particle "*nisi*", and therefore are to be taken also concurrently, because there is no alternative "*aut*" or disjunctive "*vel*" inserted into this paragraph.

Ad 1. The Ordinary alone is the judge whether bination is necessary in a certain church, parish or place. We may say: *a certain church,* not necessarily a parish church, v. g., just a mission church close to one of the great railroad centers. The Bishop has a right to determine in his prudent judgment that a certain number of Masses be said at stated hours in that mission church which is nearest the depot, for the tourists between trains.[28] There always will be a sufficient number of people who otherwise could not assist at Mass.

In regard to parish churches, it is again the Bishop who should judge how many priests are necessary there to take care of the *cura animarum,* and how many Masses are to be said on every Sunday and holyday of obligation, and at what convenient hours. It is for the Bishop, in virtue of canon 806, § 2, to judge whether or not one or two Masses should be added, even at the cost of bination, for the benefit of the people, i. e., to enable them to comply with the precept of assisting at holy Mass. And again, it is the Bishop alone who shall take into consideration the circumstances of place, time, and persons in this matter, v. g., whether this particular parish is in an industrial district where the men are employed twenty-four hours a day, even on Sundays, in alternating shifts, so that all the men are not free at a given time; whether or not there is a necessity to have a very early Mass, for instance, in the large cities, at three or four o'clock on Sundays and holydays of obligation so as to give a chance to assist at holy Mass to the newsboys, distributors of milk etc.

In regard to the need of a certain place, let us take as example a mission church way out in the country. The people of that particular place are still too poor to have a

[28] In fact, in several of the great railroad stations there are such notices posted in a conspicuous place, giving a schedule of Masses for the benefit of tourists.

resident priest with them. The population is large, however, because of an adjoining mine, railroad junction, or farm district, and not all the people could assist at just one holy Mass. In these instances, the pastors or curates of such places should explain these existent circumstances to the Bishop, who is the sole judge as to the necessity of bination.

This necessity of bination, already defined by Pope Benedict XIV [29] and incorporated into canon 806, § 2 is verified even now after the promulgation of the Code of canon law: [30] a) whenever one priest is in charge of two parishes which are separated by a great distance so that the people of these two parishes cannot assemble just at one of these two churches to comply with the Sunday's precept, and there is no other priest available who could say Mass in the other place.[31] b) whenever all the people, even of one parish, cannot convene just at one Mass due to the fact that the church is too small for the number of the parishioners, and there is no other priest to take care of the second Mass.[32]

In this country, moreover, whenever new parishes are opened, a small hall or place is rented; or the first church is a combination building, serving primarily as a parochial school, with a limited space used, for the time being, as a temporary

[29] Benedictus XIV, ep. "*Declarasti*", 16 mart. 1746—*Fontes,* n. 365; ep. encycl. "*Apostolicum ministerium*", 30 maii 1753—*Fontes,* n. 425, quoted already several times in the foregoing pages.

[30] Before the Code, the Bishops used to obtain from the Apostolic See an indult to allow the bination also for other reasons than that of necessity. This indult "inter quinquennales", however, is not mentioned any more. Even in the "Formulae facultatum" granted to the Vicars and Prefects Apostolic it is omitted.

[31] Benedictus XIV, ep. "*Declarasti*"—*Fontes,* n. 365, § 2: "Quamvis nonnulli ex theologis moralibus (et quidem nimis indulgenter) plures rationes et causas excogitaverint, ob quas sacerdos eodem die Sacrificium Missae bis offerre videatur . . . id tamen unanimi consensu permittitur sacerdoti, qui duas parochias obtineat, vel duos populos adeo seiunctos, ut alter ipsorum parocho celebranti per dies festos adesse nullo modo possit, ob locorum maximam distantiam: tunc enim absque ulla dubitatione licere existimant. . . ."

[32] Benedictus XIV, ep. encycl. "*Apostolicum ministerium*", § 11—*Fontes,* n. 425: ". . . *ob sacerdotum paucitatem*".

church. As a rule, parishes in this country are opened with a heavy loan, usually in the outskirts of the city, where the newly appointed pastor must struggle for his existence during the several years required for the stabilization of this newly organized parish. Due to the fact that he could not afford to pay an extra honorarium to a Father from a nearby monastery, and on the other hand, that not all the people of this parish can be crowded into the room where Mass is offered, there is a real case of necessity of bination. But even in these cases, the Bishop is the sole judge to decide whether one or two priests may avail themselves of the faculty of bination.

Ad 2. The second and concurrent condition, according to canon 806, § 2, is a deficiency of other priests (*penuria sacerdotum*), who will say the scheduled number of Masses *which are necessary* to be said for the benefit of the people. Here again the number of Masses to be said must be based on necessity; there is no room for Masses of accommodation, convenience or competition.

It is again for the Ordinary to decide how many priests are to be assigned to a parish church for the usual pastoral work (*cura animarum*), or how many Masses are necessary in that particular church, and whether or not there is a real necessity of bination. If the church is large enough to accommodate the people at three Masses at some intervals, let us say: at 6-8-10 o'clock, the Bishop cannot permit that an additional Mass "*of convenience*" in the form of bination be introduced; all authorities agree on this point.[33]

There is no *penuria sacerdotum* whenever another priest happens to be in that parish, v. g., during vacation, a mission or retreat conducted in the same church, or accidentally comes on Sunday morning in time to say one of the scheduled Masses, for instance, between trains. All authors agree that in such instances the faculty of bination ceases, because the necessity also ceases which is the only reason in canon law

[33] Vermeersch-Creusen, *Epitome*, II, n. 78; Noldin-Schmitt, n. 208; Génicot (ed. 1922), II, n. 239; Arregui, *Summarium theologiae moralis* (9 ed., 1925), n. 569.

justifying it; [34] it is the necessity in behalf of the people, and not of the priest, and for this reason it is a faculty granted to the place (*realis*), and not a personal privilege, as some may erroneously think. In view of this fact, any celebrant who substitutes for a local priest who has obtained the faculty of bination in that church from the Ordinary, may binate, because in this case bination is not a participation of somebody's privilege, but a remedy of necessity.[35] It would be, however, a different case, if one were substituting for a priest who had an indult of bination directly from the Apostolic See, unless the respective rescript would carry explicitly the clause allowing bination to any substitute in this particular church or oratory.[36]

There is no *penuria sacerdotum* whenever one or two pastors *emeriti,* priests without an appointment, priests immigrants etc., habitually live within the parish boundaries and say Mass every day in the parish church, although they do not know the English language well enough to read the Gospel and say a few words. As long as they may say Mass, there is a *copia sacerdotum* and none of the local priests is allowed to binate. The Bishop may even compel such priests *emeriti,* supernumerary, immigrants, etc., to take some of the scheduled Masses on Sundays; he may also compel the pastor to pay an honorarium for the services rendered, for instance, for taking the last Mass every Sunday at 11 or 11:30 o'clock, if there is no gentlemen's agreement between the pastor and the supernumerary priests.[37] This is, of course, the case when

[34] Vermeersch-Creusen, *loc. cit.;* Noldin-Schmitt, *loc. cit.*

[35] Wernz-Vidal (*Ius Canonicum,* IV, n. 94): "Facultas binandi ab Ordinario loci concessa non est privilegium personale, sed remedium pro necessitate: quare si sacerdos cui tributa est nequeat celebrare, potest binare is, qui eius vices suppleat".

[36] Can. 806, § 1: ". . . non licet sacerdoti plures in die celebrare Missas, nisi ex apostolico indulto . . ." Such an indult is a personal privilege and cannot be delegated without an explicit permission in the apostolic rescript.—Wernz-Vidal, *loc. cit.*

[37] Benedictus XIV, ep. "*Declarasti*", § 16—*Fontes,* n. 365: "Si in aliquo oppido sit unus tantum sacerdos, qui tenetur celebrare diebus festis, et adsint

the parish is large, more Masses are necessary, and the financial condition of the parish warrants it. The Bishop again is the sole judge in this matter. Good will on part of the local pastor will always find in a gentlemen's agreement some means and ways to reimburse such a supernumerary priest for his extraordinary services and inconvenience,[38] v. g., by giving him stipends for high Masses during the week, or providing a regular *subsidium* directly from the church treasury with the consent of the Bishop.[39]

A fortiori, there is no *penuria sacerdotum* in a parish church entrusted to a religious community, whenever there is a sufficient number of Fathers, or even more, in the adjoining monastery, than the schedule of the Sunday Masses to be said for the people requires. Let us say, there are seven to ten Fathers at home that particular Sunday, and only five Masses on the regular Sunday schedule. Who in the world could justify the opinion that Titius, the pastor, and Sempronius, his assistant, may still binate because the parishioners rather prefer the services of their pastor and his assistant?[40] And even if there are just five Fathers at home and also five Masses to be said on Sundays for the people, who could deny the fact that there is a *copia sacerdotum?* Suppose even that two of them are missionaries who just returned the previous night from a two weeks' mission; suppose, that two of the Fathers always at home, are advanced in years and therefore in need of longer periods of rest than the younger priests. I wonder

alii simplices sacerdotes, poterit Episcopus eos *cogere ad celebrandum diebus festis* . . . In tali tamen casu tenebitur populus aliquid contribuere iis sacerdotibus pro sustentatione. . . ."—This has again been enforced by the Apostolic See, quoted by Ferreres, *Compendium theologiae moralis* (10. ed., 1919), II, n. 488, citing a decree of S. C. de Sacr., 7 febr. 1909, and other authorities.

[38] In fact, many pastors in larger parishes are only glad to have a supernumerary priest to take care of the last Mass.

[39] The Bishop's consent is always required whenever there is a case of paying extraordinary expenses from the church treasury according to the Diocesan Statutes. Cf. Canon 1527, § 1.

[40] Such an objection has no foundation in canon law, and for this reason could be aptly called: "*monstrum inauditum in iure canonico*".

whether in either case, these priests would not welcome an opportunity to rest to the time when they will be scheduled for the later Masses? And suppose that they would prefer rather to say the early Masses, there is still no room for bination either for Titius, the pastor, or Sempronius, the assistant, in view of the many decrees already quoted above. It certainly would be a cause of admiration to the people in church, possibly even of scandal, to see a pastor or his assistant binating on a Sunday, while another Father is saying a private Mass at a side altar, or to see the latter commence a private Mass during the middle of the former's Mass at the high altar. Such an act would certainly be contrary to canon 806, § 2, there being a *copia sacerdotum.*

There are, however, two modern writers who are not quite clear on this point. Marc asserts: ". . . non liquet tamen utrum parochus teneatur alteri sacerdoti proponere ut suas partes suscipiat ",[41] overlooking so many Roman decrees and the wording of canon 806, § 2 to the contrary. Vermeersch-Creusen write: " Quare, adveniente forte alio sacerdote qui Missam hora consueta dicere velit, facultas binandi reipsa aufertur ".[42] The entire doubt in our case centers around the word " *velit* ". It is, indeed, amazing to see that these two authors make use of the word " *velit* " rather than " *potest* ". But even the " *velit* " may be rightly interpreted in conformity with canon 806, § 2, when we carefully look at the context of this assertion. Supposing that a priest is on a trip from Chicago to New York. He arrives Sunday morning at 7: 30 in Pittsburgh, rushes into a nearby church and asks the pastor to allow him to say Mass immediately on a side altar, because his train leaves within an hour. Unless he boards this train, he will be late for his appointment in New York. He is not obliged to yield to the pastor's demand to celebrate the regular 8 o'clock Mass at Pittsburgh. He can invoke the known adage: *Ad impossible nemo tenetur.* The grave inconvenience (*grave,*

41 Marc-Gestermann, *Institutiones Alphonsianae* (17. ed., 1923), II, n. 1625.

42 Vermeersch-Creusen, *Epitome* (4. ed., 1930), II, n. 78.

imo gravissimum incommodum), connected with a disappointment and serious confusion at the other end of his trip at New York, is a sufficient reason for him to say a private Mass immediately on a side altar and finish it as soon as possible and hurry back to his train; else he could not comply with the Church's precept, for he could neither say Mass this Sunday or assist at it *more laicorum.* His "*non velit*" is based on a case of impossibility; and *ad impossibile nemo tenetur.*

Consider another case where "*non velit*" is applicable. Let us suppose that a priest unexpectedly arrives on a Sunday morning in the sacristy. He is afflicted with an ugly ulcer on his face or an annoying intermittent cough; perhaps a nervous breakdown for several weeks has already prevented his saying Mass even privately in a quiet place; to say holy Mass this morning would indeed cause a great hardship or a physical strain on his feeble health; he came into the sacristy just to assist at holy Mass *more laicorum.* There is no ecclesiastical law, obliging him to say Mass in these particular circumstances, especially since he is not the pastor of this church. He complies with the ecclesiastical precept as the rest of the faithful.—His case, however, will assume a different aspect, if he wants to say Mass in this particular church where another priest has to binate. The obligation of taking one of the scheduled Masses in this church arises then from the fact that there is a *copia sacerdotum* to say the required number of Masses; no *penuria sacerdotum* as in canon 806, § 2.

Briefly: there is no obligation of saying Mass in a strange church for a visiting or a supernumerary priest, even on a Sunday; if he, however, wants to say Mass in a church where a priest has to binate, the other priest cannot binate, because there is no deficiency of celebrants, unless there would be a *grave incommodum* excusing him from supplying the *copia sacerdotum,* and thus creating the *penuria sacerdotum.* There must be, however, a "*causa proportionate gravis* a *lege excusans*".[43] If there is none, there also is no reason why a

[43] Noldin-Schmitt, *Summa theologiae moralis,* I, n. 177: "Impotentia moralis seu damnum vel incommodum proportionate grave a lege tum naturali affirmativa tum positiva divina tum humana excusat".

visiting or a supernumerary priest should be admitted to say a private Mass at his choice; there also is no obligation either out of justice or charity on the part of the pastor, or rector of the church, or the Superior of a religious community to admit him to say a private Mass. If such a priest does not intend to comply with the rule laid down about bination in canon 806, § 2, let him simply assist at holy Mass *more laicorum.* The admission of such a priest to the altar, and the approval of bination by another priest without a *causa proportionate gravis a lege excusans* in this case would be cooperation in breaking the ecclesiastical law on bination, because there is no *penuria sacerdotum* whenever another priest is available. As Noldin puts it, the faculty of bination simply ceases whenever there is another priest who is going to say Mass in the same church.[44]

Ad 3. According to canon 806, § 2, the Ordinary again is the sole judge to determine whether or not bination is necessary in a particular church due to the fact that a *notable part of the people* could not otherwise assist at holy Mass on Sundays and holydays of obligation. Here again the circumstances of place, time, persons and distance have to be taken into consideration. Is the church in this particular place large enough to accommodate all the people at two, three or four Masses on Sunday mornings? Is the schedule of Masses properly so divided as to give all the parishioners an opportunity to make accommodations at home for the various members of the family. Is this a city parish or one in the country where most of the people have a distance of from three to ten miles or even more to travel to their parish church? [45] Is the access to a parish church convenient for the people, or is it

[44] Noldin-Schmitt (*De sacramentis* [19. ed., 1929], n. 208): "Hinc si in parochia, cuius parochus facultatem binandi habet, casu moratur sacerdos, qui celebraturus sit alteram missam, cessat facultas binandi, cum cesset necessitas, quae huius facultatis est unica ratio"—Sebastiani (*Summarium theologiae moralis* [8. ed., 1925], p. 405): ". . . at binationis facultas parocho collata cessat, si alius sacerdos casu, vel vocatus, adsit".

[45] See: J. Nevins, S.S., "Mass-Going and the Automobile"—*The American Ecclesiastical Review,* LXXVIII (1928), 127-135.

subject to certain risks, v.g., across a dangerous railroad crossing, or a much travelled highway at certain hours; or dependent upon the arrival of a street car or a bus near the church just at scheduled hours? Does a notable part of the men of this particular parish have to work on night shifts on Saturday and all day Sunday? All these circumstances have a direct bearing on the question whether or not bination is necessary in this particular church. The Apostolic See has often declared that the Bishop's prudent judgment should be followed in this matter, and on his decision depends the faculty of bination,[46] whether the question involves distance or other grave circumstances affecting the possibility of assistance at holy Mass on Sundays and holydays of obligation.[47] In any event, *there must be a real necessity, a moral one,* although *not an absolute necessity,* each individual case being weighed separately with its circumstances according to the prudent judgment of the Ordinary.[48]

In regard to the question: " How many persons are required to make up a notable part of the faithful for creating a real and moral necessity of bination ", the Apostolic See has repeatedly declined to give a definite answer, and has left this decision also to the prudent judgment of the local Ordinary. It is, however, interesting to see the development of this third condition in bination. Back in 1688, the Capuchin missionaries in Greece asked the Supreme Sacred Inquisition:

[46] A classic exposition as to all these circumstances, producing the necessity to binate is to be found in S. C. de Prop. Fide, instr., 24 maii 1870, nn. 3-6, 8, 10-17, *Collectanea S. C. de Prop. Fide,* 2 vols. (Romae, 1907), n. 1352, quoted also in footnote to can. 806, § 2.

[47] *Ibid.,* n. 14: " Sed . . . quae *distantiam* respiciunt, S. Congregatio in more habuit, resolvenda haec esse prudenti Ordinariorum Missionum arbitrio, a quibus facultas pendet, ipsi enim in locis, in quibus degunt, recte aestimare possunt circumstantias in singulis casibus concurrentes ".

[48] *Ibid.,* n. 16: " Noverit ergo Amplitudo Tua, necessitatem huiusmodi, de qua sermo est, veram quidem, sed moralem intelligi; non autem absolutam; de qua proinde diiudicare in singulis casibus pendet a prudenti iudicio, inspectis circumstantiis. Caveas ergo oportet hac in re ab anxietate nimia in diiudicando, ne frustra concessa, aut pene in nullo casu ad actum reducenda facultas praedicta videatur ".

" Whether or not a missionary priest, being all alone in a place, would be allowed to say two Masses on Sundays and holydays of obligation whenever fifteen or twenty persons were legitimately hindered from assisting at the first Mass? " The Supreme Sacred Inquisition answered: " It is not lawful ".[49] Another question was asked by the Bishop of St. Louis, in 1828: " Whether or not two Masses may be said by one priest whenever thirty or fifty persons were exposed to the danger of not assisting at holy Mass of obligation? " By order of Pope Leo XII, the Sacred Congregation of the Propaganda answered: " Whenever there are grave reasons according to your own conscience and prudence, His Holiness declared that you may use this faculty without any doubt ".[50]

This aspect as to the number of faithful required to warrant a necessity or sufficient reason for bination, has undergone a great change in our times. Some prominent canonists like Vermeersch-Creusen,[51] Ferreres,[52] and moralists like Bucceroni,[53] Arregui,[54] Cardinal D'Annibale [55] designate twenty persons, who could not otherwise attend holy Mass on a Sunday or holyday of obligation, as a sufficient number, calling for a necessity of bination. Noldin[56] and Marc[57] demand from

[49] *Ibid.*, n. 13: " Utrum missionarius sacerdos solus in loco degens duas Missas diebus dominicis et festivis pro quindecim seu viginti personis, quae legitime primae Missae adesse non valuerunt, celebrare possit? " et Suprema S. Inquisitio die 28 ianuarii eiusdem anni decrevit: non licere.

[50] *Ibid.*, n. 14: " At iussu Leonis XII litteris datis die 13 martii rescriptum est . . . conscientiae ac prudentiae tuae committere, ut iudices, quibus in casibus, ratione habita adiunctorum dioecesis tuae, graves adesse causae censendae sint, facultatem, de qua sermo est, sacerdotibus impertiendi. Ubi vero has causas graves secundum conscientiam prudentiamque tuam arbitratus fueris, Sanctitas Sua posse te absque ulla dubitatione ea facultate uti benigne declaravit ".

[51] Vermeersch-Creusen, *Epitome,* II, n. 78.

[52] Ferreres, *Compendium theologiae moralis,* II, n. 488.

[53] Bucceroni, *Institutiones theologiae moralis* (2. ed., 1893), II, n. 638.

[54] Arregui, *Summarium theologiae moralis,* n. 569.

[55] D'Annibale, *Summula theologiae moralis* (4. ed., 1897), III, n. 405, footnote 55.

[56] Noldin-Schmitt, *De sacramentis,* n. 208, 2, a.

[57] Marc-Gestermann, *Institutiones Alphonsianae,* II, n. 1626, 3, a.

thirty to fifty persons as a sufficient number. Wernz-Vidal,[58] Sabetti,[59] and Génicot [60] do not give any number of persons.

The following rules, however, may in our times serve as a safe guide. Whenever there is a separate community, whether it is a filial church or mission, although only about one mile distant from another church and consisting of about twenty persons who could otherwise not hear holy Mass of obligation, there is a canonical reason for a priest to binate, if no other priest is available. In larger cities, whenever the Bishop sends a priest to organize a new parish with the appointment as pastor of this new congregation, and the other conditions, laid down in canon 806, § 2, really occur, the Bishop also may give him the faculty to binate whenever about twenty persons otherwise could not comply with the Sunday's precept. This rule also applies to hospitals and other charitable or pious institutions, whenever about twenty persons cannot assist at the first Mass said by the chaplain, and would miss Mass on Sundays and holydays of obligation, if there were not a second Mass in this place for them. If there is no other priest available, a case of necessity for bination arises. And this statement is based on a solution given by the Sacred Congregation of the Council, concerning a community about one mile distant from the parish church and numbering about twenty persons.[61] The wording of the S. Congregation's solution with the particle "*about*" (*circiter*) admits also exceptions. Take, for example the case in which twenty-five or thirty persons attend holy Mass every Sunday at 6 o'clock during the summer months, but in winter only about twenty persons.

[58] Wernz-Vidal, *Ius Canonicum*, IV, n. 94.

[59] Sabetti-Barrett, *Compendium theologiae moralis* (28. ed., 1919), II, n. 714, Quaer. 3°. The author gives the entire solution just by quoting the Third Council of Baltimore, n. 103.

[60] Genicot, *Institutiones theologiae moralis* (10 ed., 1922), II, n. 239.

[61] *A.S.S.*, I (1865-66), 8, 9: Summarium precum die 12 ian. 1847, *in Lingonen*, ad 2: ". . . aderat quaedam communitas uno circiter lapide a parochiali ecclesia separata constans viginti circiter personis. Et S. C. respondit: 'Scribatur Episcopo ut concedat bis Missam celebrandi licentiam, quatenus eae circumstantiae, et praecisae necessitatis casus concurrant. . . .'"

One Sunday morning, a snow storm arises; only seventeen persons are in church. The priest nevertheless may start the usual Mass at 6 o'clock, because it is only by an accident that some stayed away from the early Mass and preferred under these circumstances to attend a later Mass this morning.

All these above mentioned cases refer to parish churches or to religious or charitable institutions with a public or semi-public oratory under the ordinary jurisdiction of the local Ordinary, and deal only with bination, as permitted in canon 806, § 2. It is not, however, in the power of the local Ordinary to allow a priest to celebrate more than two Masses on Sundays and holydays of obligation.[62] Of course, Christmas and All Souls' Day are privileged days by law.[63] All contrary opinions, defended formerly by Avanzini,[64] and Cardinal D'Annibale,[65] are now, after the promulgation of the Code of canon law, obsolete and untenable.[66]

In some extraordinary circumstances, however, whenever there is a case of necessity and for the benefit of the people of small communities of about twenty persons, *the Apostolic See* may give permission to a priest, with the approval of the local Ordinary,[67] to say three Masses on Sundays and holydays of obligation,[68] or even to binate on some suppressed holy-

[62] Canon 806, § 2: ". . . non est autem in eius potestate plures quam duas Missas eidem sacerdoti permittere".

[63] Canon 806, § 1: "Excepto die Nativitatis Domini et die Commemorationis omnium fidelium defunctorum, quibus facultas est ter offerendi Eucharisticum Sacrificium, non licet sacerdoti plures in die celebrare Missas. . . ."

[64] Avanzini, quoted by Wernz-Vidal, *Ius Canonicum,* IV, n. 94.

[65] D'Annibale (*Summula theologiae moralis,* III, n. 405, footnote 55): ". . . ut quis tot celebret, quod necessariae sunt. . . ."

[66] Canon 806, § 2 did away with all opinions to the contrary, as it is evident from the wording of this paragraph.

[67] No petition of a priest is accepted by the Roman authorities unless it has the Bishop's approval and seal, and no rescript is issued to a priest without the Bishop's consent.—All the religious need the endorsement of their respective major Superiors.

[68] Only recently, such a privilege was given to a priest in California due to the fact, that he had three distinct missions in a vast territory, and that no other priest was available.

days on account of some extraordinary celebrations.[69] But only the Apostolic See is competent to grant this faculty.

An apostolic indult to say three Masses on Sundays and holydays of obligation was formerly given to all the priests of the archdiocese of Mexico City for five years,[70] which was subsequently renewed several times, and likewise to those of the diocese of Tulancingo, Mexico,[71] for five years and subsequently renewed under certain conditions.[72] Just recently in 1938, such a privilege was given to the diocese of Valparaiso, Chile.[73]

By an apostolic indult, some priests in the archdiocese of Valladolid (Vallisoletana), Spain, could say one Mass in their own church and say a second Mass in the chapels of cloistered nuns who were without chaplains.[74] Of course, the reason always given by the local Ordinaries was a scarcity of priests on Sundays and holydays of obligation.

During the religious persecutions recently in Mexico, Soviet Russia, and Spain, the Apostolic See granted special faculties to all the priests to say three Masses; [75] even to administer the Sacraments without observance of all the liturgical laws. All military chaplains also receive special faculties directly from the Apostolic See for the duration of war, but always under certain conditions and with the approval and consent of their immediate Military Ordinaries.[76]

[69] S. C. Sacr., 7 febr. 1938, *ad triennium*—Bouscaren, *The Canon Law Digest*, Supplement, 1941, ad. can. 806, pp. 90, 91.

[70] S. C. C., 20 dec. 1879 *ad quinquennium*—*A.S.S.*, XXIX, 92.

[71] S. C. C., 9 sept. 1899, quoted by Ferreres, *Compendium theologiae moralis*, II, n. 489, where also the other dates of renewal are given.

[72] *A.S.S.*, XXIX, 92: ". . . ut, concessionis tempore durante, ea qua praestas prudentia ac solertia, res componere satagas, ad tramites disciplinae vigentis, qua scilicet plebis necessitati audiendi Sacrum satis consulatur per binationem".

[73] S. C. Sacr., 25 ian. 1938, *ad triennium*—Bouscaren, *The Canon Law Digest*, Supplement, 1941, p. 40.

[74] S. C. C., *Vallisoletana*, 7 apr. 1883—*A.S.S.*, XVI, 35-36.

[75] Vermeersch-Creusen, *Epitome*, II, n. 78.

[76] *A.A.S.*, VII (1915), 268, 269, where references are made to many other documents issued by the Apostolic See. *Ibid.*, pp. 287, 288.

These, of course, are extraordinary circumstances and always give rise to cases of necessity.

* * * *

Corollary I. Bination is a case of necessity, and not a privilege of convenience, as erroneously stated in a recent discussion of the subject.[77]

Corollary II. Bination, permitted by an Ordinary, is not a privilege given to an individual priest, but only a remedy in case of necessity.[78] Therefore, it ceases *ipso facto,* whenever another priest is available, that is, one who is going to say Mass in the same church.[79] Only a proportionately grave reason will excuse him from the obligation of taking one of the scheduled Masses in that church on Sundays and holydays of obligation, and thus cause a *penuria sacerdotum,* allowing another priest to binate.[80]

Corollary III. The local Ordinary alone is the proper judge whether and how frequently bination may be permitted in a parish church or any public or semi-public oratory, that is, whether and how often there is presented a case of necessity in which about twenty persons could not otherwise assist at holy Mass on Sundays and holydays of obligation.[81]

Corollary IV. Due to the fact, that bination is not a privilege of convenience and *only a remedy in case of necessity,* as explained above, it is restricted to the conditions laid down in canon 806, § 2, and especially to the *penuria sacerdotum* mentioned therein. For this reason it does not admit any broad interpretation as erroneously stated in the discussion

[77] See: *The Homiletic and Pastoral Review,* XLI (March, 1941), 639.

[78] Wernz-Vidal (*Ius Canonicum,* IV, n. 94): "Facultas binandi ab Ordinario loci concessa non est privilegium personale, sed remedium pro necessitate". Cf. Noldin-Schmitt, *De sacramentis,* n. 208, b.

[79] S. C. Sacr., 7 febr. 1909, quoted by Ferreres, *Compendium theologiae moralis,* II, n. 488, where he also gives other authorities on this matter.

[80] Noldin-Schmitt, *Summa theologiae moralis,* I, n. 117.

[81] S. C. C., *Lingonen.,* 12 ian. 1847—*A.S.S.,* I (1865-66), 8, 9.

noted above. The conclusion of its arguments is wider than its premises.[82]

Corollary V. A Bishop's permission to binate, granted to a priest in the form of "Diocesan Faculties", or to a pastor of a parish church, cannot be contrary to canon 806, § 2. The Bishop's power in this matter is also ruled by the general principles of the Code of canon law.[83]

Cyril Piontek, O.F.M.

Green Bay, Wisconsin

[82] See: *The Homiletic and Pastoral Review,* XLI (March, 1941), 639 where this statement is made: "This faculty is broad and should not be subjected to a narrow interpretation . . . There is no evident obligation which requires an unoccupied priest to go to a mission or even to the parish church of the Religious house. . . ."—The solution is entirely wrong and leads *ad absurda,* because it is contrary to canon 806, § 2, and to the many Roman decrees quoted to the contrary.

[83] Cf. canon 84, § 1: "A lege ecclesiastica ne dispensetur sine iusta et rationabili causa, habita ratione gravitatis legis a qua dispensatur; alias dispensatio ab inferiore data illicita et invalida est".

Cases and Studies

COMMUNITY VOW

Question. The vigil of St. Patrick's Day is observed in this parish as a day of fast and abstinence as the result of a vow made by the parish during the cholera epidemic some seventy years ago. I have been pastor here for only a short time, but I am wondering how to meet the problem that will arise when the vigil falls on a Sunday. Will the parish be obliged to anticipate the vigil on Saturday or will it be exempt altogether from the obligation of fast and abstinence as arising from the vow?

PAROCHUS

Answer. Canon 28: Consuetudo praeter legem, quae scienter a communitate cum animo se obligandi servata sit, legem inducit, si pariter fuerit rationabilis et legitime per annos quadraginta continuos et completos praescripta.

Canon 1245, § 1: Non solum Ordinarii locorum, sed etiam parochi, in casibus singularibus iustaque de causa, possunt subiectos sibi singulos fideles singulasve familias, etiam extra territorium, atque in suo territorio, etiam peregrinos, a lege communi de observantia festorum itemque de observantia abstinentiae et ieiunii vel etiam utriusque simul dispensare.

§ 2: Ordinarii, ex causa peculiari magni populi concursus aut publicae valetudinis, possunt totam quoque dioecesim seu locum a ieiunio et ab abstinentia vel etiam ab utraque simul lege dispensare.

Canon 1252, § 4: Diebus dominicis vel festis de praecepto lex abstinentiae, vel abstinentiae et ieiunii, vel ieiunii tantum cessat, excepto festo tempore Quadragesimae, nec pervigilia anticipantur: item cessat Sabbato Sancto post meridiem.

Canon 1253: His canonibus [1250-1252 et 1254] nihil immutatur de indultis particularibus, de votis cuiuslibet personae physicae vel moralis, de constitutionibus ac regulis cuiusvis religionis vel instituti approbati sive mulierum in communi viventium etiam sine votis.

Canon 1254, § 1: Abstinentiae lege tenentur omnes qui septimum aetatis annum expleverint.

§ 2. Lege ieiunii adstringuntur omnes ab expleto vicesimo primo anno ad inceptum sexagesimum.

Canon 1307, § 1: Votum, idest promissio deliberata ac libera Deo facta de bono possibili et meliore, ex virtute religionis impleri debet.

§ 2: Nisi iure prohibeantur, omnes congruenti rationis usu pollentes, sunt voti capaces.

§ 3: Votum metu gravi et iniusto emissum ipso iure nullum est.

Canon 1308, § 1: Votum est *publicum,* si nomine Ecclesiae a legitimo Superiore ecclesiastico acceptetur; secus *privatum.*

§ 3: *Reservatum,* cuius dispensationem sola Sedes Apostolica concedere potest.

§ 4: *Personale,* quo actio voventis promittitur; *mixtum,* quod personalis et realis naturam participat.

Canon 1309: Vota privata Sedi Apostolicae reservata sunt tantummodo votum perfectae ac perpetuae castitatis et votum ingrediendi in religionem votorum sollemnium, quae emissa fuerint absolute et post completum decimum octavum annum.

Canon 1310, § 1: Votum non obligat, ratione sui, nisi emittentem.

§ 2: Voti realis obligatio transit ad heredes; item obligatio voti mixti pro parte qua reale est.

Canon 1311: Cessat votum lapsu temporis ad finiendam obligationem appositi, mutatione substantiali materiae promissae, deficiente conditione a qua votum pendet aut eiusdem causa finali, irritatione, dispensatione, commutatione.

Canon 1313: Vota non reservata possunt iusta de causa dispensare, dummodo dispensatio ne laedat ius aliis quaesitum:

1°. Loci Ordinarius quod attinet ad omnes suos subditos atque etiam peregrinos;

3°. Ii quibus ab Apostolica Sede delegata fuerit dispensandi potestas.

The text of the quoted canons has been here reproduced simply for the sake of a handy reference when one or the other canon must be kept in mind in the course of the following discussion. The community vow which figures in the submitted case is to be regarded as a personal vow. The continued obligation of this vow even after the death of all of the original members of the community which made the vow must be explained in the light of the moral solidarity and continuity of the personnel which constitutes the community, for no change is effected in the personality of the community itself through the gradual displacement of its former individual members by oncoming new generations. The community vow therefore can remain efficaciously binding even after the lapse of many years following the original act which established the obligation of the vow.

If the duty of observing fast and abstinence in the present case had been created by way of customary usage in accordance with the conditions expressed in canon 28, then one could well treat of the obligation as one which arises through positive legislation, and canons 1245 and 1252, § 4, would be applicable, for a law which arises through customary usage is subject to the same rules and

dispositions with reference to the factors involved in its obligatory character, in the possibility of a dispensation from its binding power, and in its eventual cessation in the nature of an imposed duty as is a law which results from the positive enactment of a competent authority. But the obligation here considered plainly derives from a vow and therefore calls for its fulfillment in view of the virtue of religion. It is from this angle that a solution for the query must be sought.

It is precisely a situation like the present one that Vermeersch-Creusen seemed to have in mind when they wrote:

> Si quod votum autem obliget communitatem ad ieiunium in die qua non est praescriptum iure communi ieiunium, *nisi expresse aliter sit dispositione positiva iniunctum,* obligatio ista erit tamen ex regulis iuris communis interpretanda. Sic Romae exsistit votiva obligatio ieiunii in vigilia festi Purificationis. Quando festum istud incidit in feriam II, sabbato non est ieiunandum, propter regulam iuris communis de non anticipanda vigilia.[1]

The difference between their case and the present situation is not a substantial one. They speak of fast alone; the present case contemplates both fast and abstinence. Their case invariably falls outside of Lent; the present case falls always within Lent. But even in the present case the obligation of abstinence as arising from the vow will quite generally exist as a duty distinct from any enactment of the common law of the Church inasmuch as in the United States the abstinence of Saturday in Lent is transferred to Wednesday. Thus the points of comparison remain substantially the same in the two cases.

It may also be recalled that the fast which according to the law of canon 1166, § 2, must precede the consecration of a church is to be regulated in accordance with the common law concerning the ecclesiastical fast.[2] This interpretation is rightly understood as referring not only to the question of quantity and quality in the food, but also to the factor of age and likewise to the item of anticipation should the day of the Church's consecration fall on a Monday or on a day that follows immediately upon a holyday of obligation.

[1] *Epitome iuris canonici* (3 vols., Vol II, 5. ed., Mechliniae-Romae, H. Dessain, 1934), II, n. 569. The italics in the quoted text are inserted by the present writer.

[2] Pontificia Commissio Interpretationis (*PCI*), 20 iul. 1929, ad III—*Acta Apostolicae Sedis* (*AAS*), XXI (1929), 573.

Nevertheless it appears to the writer that in the case here considered there is no room for the application of the Church's common law in its regulations on fast and abstinence, but that the case must be solved in the light of canons 1307 ff., which deal with vows and the conditions under which they cease to bind or in which a dispensation can be granted. Canon 1253 indicates the cases in which the present rulings of the canons on fast and abstinence have no application. The wording of this canon is sufficiently general in its import—it refers to the vows of any physical or moral person—that the vow of a community seems to be included among the cases in which the present laws on fast and abstinence may not be invoked as applicable. Thus it seems that the obligation of the fast and abstinence will remain for Sunday itself, even as fast and abstinence both remain obligatory in the event that the Feast of St. Joseph, March 19th, falls on a Friday, wherever the common law of the Church obtains to constitute it as a holyday of obligation.[3]

This conclusion appears to be at least indirectly supported by an interpretation of the Code Commission under date of November 24, 1920. The query and answer may profitably be reproduced in full:

I.—1° Utrum ad normam can. 1252, § 4, ieiunium cesset quando dies festus, qui ieiunium in vigilia habet adnexum, incidit in feria II, ita ut non amplius ipsum ieiunium anticipari debeat sabbato praecedenti.

Resp.: Ad 1um: Affirmative, *salvo praescripto canonis 1253.*[4]

It is to be noted that the answer was indeed given in the affirmative, but not without due qualification. There are, then, cases in which the rule of canon 1252, § 4, concerning the question of the anticipation of the vigil does not apply.

If the present situation is to be included among these cases, then the matter must indeed be settled according to the law expressed in canons 1307 ff. Now, the vow taken by the community was neither a public vow in the sense of canon 1308, § 1, nor a private vow which can in any way be identified with the two reserved private vows of which mention is made in canon 1309. Nor has it ceased automatically through the lapse of any predetermined time for the sole duration of which it was assumed as binding, or through any substantial alteration in its material content, or through the absence of any specific condition upon which it was made to depend.

[3] *PCI*, 24 nov. 1920, ad II, 1-2—*AAS*, XII (1920), 576.

[4] *AAS*, XII (1920), 576. Italics inserted.

It has not been set aside; it has not been commuted; it has not lost its binding force through any granted dispensation. Hence the obligation of the vow still remains.

The conditions which surround the case are such, however, that a dispensation appears fully justifiable. If the vow is not dispensed then the community will be subject to a fast for a continuous and uninterrupted period of two weeks. That in itself seems to be a sufficient reason for relaxing the binding force of the vow by means of a dispensation, or at least through a commutation. Inasmuch as the vow is not a reserved vow, from which the Holy See alone can dispense in the absence of specially delegated faculties, the local ordinary can grant the dispensation when the need or utility for it arises.

The answer, then, seems to be that the obligation of fast and abstinence will attach not to Saturday, but to the Sunday itself, and that the community will remain subject to the fulfillment of its vow as long as the obligation has not been relaxed by means of a dispensation or perhaps through a commutation. The solution offered by Vermeersch-Creusen is perhaps not inadequate as an interpretation; but it appears that a dispensation should be granted by the local ordinary at least *ad cautelam*. That, indeed, since it is within the local ordinary's power, appears to be the preferable and also the more secure procedure in the case.

CLEMENT BASTNAGEL

THE CATHOLIC UNIVERSITY OF AMERICA

PLACE FOR THE CELEBRATION OF MASS

Question. Prior to my sailing to South America I shall be entertained on a yacht by my brother. We shall be on his yacht Saturday and could remain there if I were permitted to say Mass for the party on Sunday morning. I have permission from the Most Reverend Apostolic Delegate to say Mass aboard ship. There is no oratory on the yacht. It will be within the three-mile limit off the shore of our diocese. Have I under the circumstances enough reason to seek permission from the bishop for the celebration of Mass on board the yacht?

PEREGRINUS

Answer. Canon 822, § 1: Missa celebranda est super altare consecratum et in ecclesia vel oratorio consecrato aut benedicto ad normam iuris, salvo praescripto can. 1196.

§ 4: Loci Ordinarius aut, si agatur de domo religionis exemptae, Superior maior, licentiam celebrandi extra ecclesiam et oratorium super petram sacram et decenti loco, nunquam autem in cubiculo, concedere potest iusta tamen ac rationabili de causa, in aliquo extraordinario casu et per modum actus.

Canon 1196, § 1: Oratoria domestica nec consecrari nec benedici possunt more ecclesiarum.

§ 2: Licet oratoria domestica et semi-publica communi locorum domorumve benedictione aut nulla benedictione donentur, debent tamen esse divino tantum cultui reservata et ab omnibus domesticis usibus libera.

Canon 1249: Legi de audiendo Sacro satisfacit qui Missae adest quocumque catholico ritu celebretur, sub dio aut in quacumque ecclesia vel oratorio publico aut semi-publico et in privatis coemeteriorum aediculis de quibus in can. 1190, non vero in aliis oratoriis privatis, nisi hoc privilegium a Sede Apostolica concessum fuerit.

There are involved here two specific considerations: 1) does a priest who has permission to celebrate Mass *in mari* need an additional permission if he is to celebrate the Mass outside of at least a semi-public oratory? and 2) do the people who attend such a celebration of Mass on Sunday fulfill their Sunday obligation in the matter of hearing Mass?

1. The permission which the Apostolic Delegate can grant for the celebration of Mass *in mari* is a specific grant which allows a priest to use the faculty, provided that there be nothing unbecoming about the place where the Mass is celebrated, and that there be no danger of the spilling of the Precious Blood. If in the present case the permission was granted in that fashion, then there is no need of any further permission for the celebration of Mass in a place on board ship when the ship has no chapel or oratory, for the lack of such a chapel or oratory does not at all preclude the possibility of employing a becoming place for the celebration of Mass.

But if the Delegate's permission presupposes that Mass on board ship be said in a regularly established chapel or oratory, then there is need of a further permission either from him or from the local ordinary to make the celebration of Mass on board ship but outside of a chapel or oratory a lawful procedure. The local ordinary's faculty for permitting the celebration of Mass in such circumstances must be interpreted restrictively. This appears not only from the answer of the Code Commission on October 16, 1919,[1] but also from the settlement of a case by the Sacred Congregation of the Sacraments for the Bishop of Mondovi in Piedmont, Italy, on January 5,

[1] N. 12—*Acta Apostolicae Sedis* (*AAS*), XI (1919), 478.

1928,[2] from a letter of this Congregation to the Bishops of Italy regarding the use of their faculty in virtue of canon 822 to permit the celebration of Mass *sub dio*,[3] and from a reply of the same Congregation on May 3, 1926, to some Spanish Bishops regarding the celebration of Mass at the home of a deceased person.[4]

The pertinent questions and answers in the latter case were these:

I. Utrum Ordinarius vi canonis 822, § 4 permittere possit Missae celebrationem domi praesente cadavere in loco vulgo *camera ardente*.

R. *Negative*, nisi agatur de casu aliquo extraordinario, exstante iusta et rationabili causa: et hoc etiam in casu, dummodo cadaveris expositio fiat servato debito decore, ac in eodem loco nihil adsit quod sit alienum a sanctitate divini Sacrificii.

II. Quando censendus sit haberi casus extraordinarius, vi cuius, concurrente iusta et rationabili causa, permitti possit ab Ordinario Missae celebratio, et utrum unius tantum aut plurium Missarum celebratio permitti possit?

R. Casum extraordinarium haberi, unaque simul iustam et rationabilem causam, occasione obitus Episcopi residentialis, seu loci Ordinarii, aut personae e principe familia, aut aliter insignis ob merita et benefacta in Ecclesiam vel in rempublicam, vel ob munificentissimas elargitiones in pauperes et egenos; itemque personae huiusmodi privilegio Apostolico iam ornatae; dummodo semper debitae exsequiae expleantur in ecclesia.

Tunc Ordinarius permittere poterit unius aut alterius Missae, sed non plus quam trium Missarum celebrationem: abrogato indulto Sacrae Rituum Congregationis diei 29 aprilis 1894 et contrariis quibuscumque minime obstantibus; *facto verbo cum SSmo*.[5]

Since in the submitted case there are at most vacation needs—if indeed they be needs—that could be served, it appears altogether unlikely that there exists a sufficient cause to permit the bishop to grant the celebration of Mass outside of an oratory despite the already received permission to celebrate Mass on board ship. It is the need of the community and not the convenience of a private family that is to be consulted by the bishop through the use of the faculty which canon 822, § 4, accords to him.

2. In the event that the priest has due authorization to celebrate Mass on board ship even outside of an oratory it may safely be assumed that those who attend his Mass on Sunday can thereby also fulfill what is required of them in the hearing of Mass on Sunday.

[2] *AAS*, XX (1928), 79-81.

[3] July 26, 1924—*AAS*, XVI (1924), 370-371.

[4] *AAS*, XVIII (1926), 388-391.

[5] *Ibid.*, p. 388.

Surely, if the circumstances under which he celebrates Mass do not prevent him from fulfilling his own Sunday obligation, then it is difficult to see how those who attend his Mass will fail to fulfill their Sunday obligation, unless they have been expressly excluded from sharing in the priest's privilege. That which is made possible for him must be assumed as being made possible for the rest who share in the same action, as long as no express indication has been given to the contrary.

But in the event that the priest himself is not properly authorized for the celebration of Mass outside of an oratory it follows that those who attend his Mass likewise cannot have any reason to assume that they have attended Mass *under the circumstances which the Church requires for the proper fulfillment of the Sunday precept.* They have indeed heard Mass, but not after the manner which the Church sets up for the substantially complete fulfillment of the law regarding the hearing of Mass on Sunday.

CLEMENT BASTNAGEL

THE CATHOLIC UNIVERSITY OF AMERICA

THE TERMS *Incardination* AND *Excardination*

ARTICLE I

ETYMOLOGY OF THE TERMS

THE verb *to incardinate,* whenever used in an ecclesiastical sense from the sixth century to the time of the Code, invariably meant to perpetually attach a person, particularly a cleric, to a new diocese after he had been transferred from another, with a view to the engagement of his services as an ecclesiastic.

The verb *to excardinate,* appearing for the first time in the nineteenth century, meant, correlatively, to perpetually transfer a person from a diocese to which he already belonged.

Each of the two words is a compound of a preposition with the adjective *cardinatus.* This adjective was first used in the time of Caesar Augustus by an authority on architecture, Marcus Pollio Vitruvius,[1] and it has its root in the classical Latin word *cardo,* a hinge.[2] To understand the metaphorical use of the

[1] *De Architectura Libri Decem ad Caesarem Augustum,* Lugduni (1552).

[2] Freund-Leverett, *Lexicon,* "cardo."

word *cardo,* it must be explained that a hinge originally consisted of a point-like extremity on one beam, requiring a cavity at the end of another, so that the former, inserted into the latter, could revolve. A door, for example, was made by erecting a strong vertical beam, with round, pointed projections at both ends, between two other beams placed horizontally, above and below the doorway, with cavities prepared in the ends of them in such a position that the projections of the vertical beam would fit into the cavities of the transverse beams, allowing the vertical beam a free, revolutionary movement. Sufficient paneling was then added to the vertical beam to cover the area of the doorway. Thus the door had two hinges or *cardines.* The vertical beams were called *scapi cardinales,* that is, the beams bearing the *cardines* or points.[3]

The use of the word *cardo,* however, was not confined to a rotary object. It was a generic term applicable to the tenon and mortise principle of attaching one beam to another.[4] Consequently a beam was said to be *cardinated* if it had tenons or projections on its extremities making it possible for it to be attached in a fixed manner to another beam,[5] and the same was termed *intercardinated* when it was actually attached.[6]

[3] "Fores ita compingantur, uti scapi cardinales sint ex altitudine luminis totius duodecima parte."—Vitruvius, *De Architectura,* Lib. IV, cap. 6, *De ostiorum et antepagmentorum sacrarum aedium rationibus,* p. 153. The uprights had to be one-twelfth longer than the aperture because of the jutting points.—*Ibid.,* Annotat., p. 156. Hence, too, the distinction between the male and female in a hinge: "In eo autem minus tympanum includatur *cardinibus* ex torno, *masculo* et *foemina* inter se coartatis, ita uti minus tympanum, quemadmodum epistomium, in maiore circumagendo arcte leniterque versetur."—*Op. cit.,* Lib. IX, cap. 9, *De horologiorum ratione,* p. 397; *ibid.,* Annotat., p. 399.

[4] "... regulae capitibus ad normam coagmentatos, et inter regulam et ancones a cardinibus compacta transversaria, ..."—*Op. cit.,* Lib. VIII, cap. 6, *De perductionibus et librationibus aquarum, et instrumentis ad hunc usum,* p. 343. "Supra trabes collocentur capreoli cardinibus alius in alium conclusi, in altitudine excitati pedes IX..."—*Op. cit.,* Lib. X, cap. 20, *De testudine, etc.,* p. 440. On this passage the Annotator remarks: "*Cardinibus alius in alium conclusi*—Cardines hoc loco intelliguntur extremae capreolorum partes, quae in cavum induntur, quomodo cardinatum tignum dicitur capite proximo. Idem in postibus, trabibus, transversariis, scapis, parastatis intelligendum. Ipsum autem cavum nostri materiarii mortesiam, cardinem vero tenonem dicunt."—*Ibid.,* Annotat., p. 440.

[5] "Erigebantur et arrectaria duo compacta . . . coniuncta capitibus transversario cardinato tigno, et altero mediano inter duos scapos cardinato, et laminis ferreis religato: ..."—*Op. cit.,* Lib. X, cap. 21, *De aliis testudinibus,* p. 441; Freund-Leverett, *Lexicon,* "cardinatus."

[6] "Eae [postes compactiles] concluduntur superne intercardinatis trabibus..." —Vitruvius, *op. cit.,* cap. 20, *De testudine ad congestionem fossarum paranda,* p. 440.

ARTICLE II

SIGNIFICANCE OF THE WORD *Cardinal*

Authors are inclined to establish a real connection between the terms *incardinate* and *cardinal* so that in a general way *to incardinate* would always mean *to make a cardinal.* They are moved to do so by the coexistence of the two terms so frequently in the letters of Pope Gregory I as well as by their apparent common stem. Before tracing the historical development of the verb *to incardinate,* therefore, it is the purpose of this Article to attempt to give a definite decision on the ancient meaning of the word *cardinal* and its bearing on the subject of this study.

There are four general opinions, each of which will be considered in turn.

1st. A cardinal meant any priest, deacon, (or even cleric) permanently attached to a church or diocese.

2nd. A cardinal meant a Bishop, priest, or deacon who, being forced because of persecution or some other reason to abandon the church or diocese to which he belonged by ordination, was temporarily attached to another church or diocese.

3rd. A cardinal was a Bishop, priest, or deacon attached to the principal church of the diocese, and in later years it included also those attached to any principal church within the diocese.

4th. A cardinal was the principal or ruling officer, whether Bishop, priest, or deacon of a diocese, church, oratory, or *diaconia,* who was at the same time permanently attached thereto.

1. *First opinion. A cardinal was any permanently attached priest or deacon.*—This opinion is advanced by a consultor of the Sacred Congregation of the Council,[7] by Hatch,[8] Sägmüller,[9] Devoti,[10] Creusen,[11] and Chelodi.[12] According to them, *to in-*

[7] On discussion of *Dubia* proposed on Aug. 21, 1897—*AkKR,* LXXIX (1899), 95-96.

[8] *Organization of Early Christian Churches,* (8th impression, London, 1918), p. 206, note 25.

[9] Art. "Cardinal,"—*Catholic Encyclopedia* (*Cath. Ency.*), III, 333 b.

[10] *Institutionum Canonicarum Libri IV* (*Instit. Can.*), (2 vols., Leodii, 1883), lib. I, tit. III, sec. II, § 23, note 4.

[11] Vermeersch-Creusen, *Epitome Iuris Canonici* (*Epit.*), (2. ed., 3 vols., Mechliniae-Romae: H. Dessain, 1924-1925), I, n. 307.

[12] *Ius de Personis* (*De Pers.*), (2. ed., Tridenti: Libr. Edit. Tridentum, 1927), n. 156.

cardinate meant to ascribe a priest or deacon permanently to a particular church.

This is erroneous. As early as the fourth century all clerics were permanently attached by law to the church of their first ordination and yet all were not designated as cardinals, for oftentimes mere priests were mentioned without such a title.[13]

2. *Second opinion. A cardinal was an exiled Bishop, priest or deacon temporarily placed in another church.*—The most recent and staunchest proponent of this theory was Tamagna,[14] who read that meaning out of the epistles of Pope Gregory the Great and who concluded, therefore, that *to incardinate* in the early ages meant the act of thus transferring a cleric temporarily.

His opinion is incorrect because: a) on one occasion a cardinal priest was constituted by ordination in his own church,[15] and b) in other cases such an interpretation would be repugnant to the rest of the context, e. g., where the clergy or people of a church asked the Pope to send them some particular individual as their cardinal priest, and were congratulated by the Pope on having asked for such a man.[16]

3. *Third opinion. A cardinal was a Bishop, priest or deacon (later on even a cleric) attached to the principal church of the diocese or, still later, to any principal church within the diocese.*—In other words, the term *cardinal* was understood to have primarily referred to a place, and only secondarily to the persons thereto attached. Bellarmine,[17] Wernz,[18] and De Meester [19] follow this view.

[13] Cf., e. g., Greg. Mag., lib. I, epist. 15—*MPL*, LXXVII, 460-461; *ibid.*, epist. 53—*MPL*, LXXVII, 515; *ibid.*, epist. 78—*MPL*, LXXVII, 532; *ibid.*, epist. 81—*MPL*, LXXVII, 534; lib. IV, epist. 11—*MPL*, LXXVII, 679; lib. VI, epist. 12—*MPL*, LXXVII, 803.

[14] *Origini e Prerogative De' Cardinali*, cap. III, especially n. 49. He claimed that he followed Gonzales, Reiffenstuel, Lancellottus, Fleury, and Florente.—*Ibid.*, p. 98.

[15] Greg. Mag., lib. I, epist. 15—*MPL*, LXXVII, 460-461.

[16] *Ibid.*, lib. II, epist. 9—*MPL*, LXXVII, 545; *ibid.*, lib. III, epist. 13—*MPL*, LXXVII, 614-615; cc. 5-6, C. XXI, q. 1; *ibid.*, lib. III, epist. 14—*MPL*, LXXVII, 615.

[17] *De clericis*, lib. I, c. 16.

[18] *Ius Decretalium*, (3. ed., 6 vols., Prati, 1915), I, n. 359, ss.

[19] *Iuris Canonici et Iuris Canonico-Civilis Compendium* (*Compendium*), (ed. nova, Brugis: Sumptibus et Typis Societatis Sancti Augustini, 1923), II, n. 553.

It lacks probability because even oratories, which were by no means principal churches, had their cardinals.[20]

4. *Fourth opinion. A cardinal was a proper residential clerical Superior.*—He was the Titular and Primary Beneficiary of a place.[21]

This opinion is truly correct and best agrees with the usage of the term *cardinalis.* The scapi *cardinales* of Vitruvius,[22] be it remembered, where the word occurred for the first time, meant the beams bearing the *cardines* or points. Since Varro and Cicero used *cardines* to denote the points or poles of the earth; Pliny, in the first century, to denote the main points of the year separating the seasons; and Quintillian, in the same century, to describe the four quarters or points of the heavens,[23] it was but logical for the adjective *cardinalis* to become synonymous with *chief* or *principal,* as it did, at least by the fifth century, in the writings of the grammarian, Servius Honoratus.[24]

Applied ecclesiastically, *cardinalis* assumed the meaning of an important or principal cleric of a church. Its first known use as such was in the Council of Rome under Pope Sylvester in 314.[25] Efforts to trace it earlier in the Church are based on fragmentary accounts of the *Liber Pontificalis.* Thus

[20] Greg. Mag., lib. IX, epist. 70—*MPL,* LXXVII, 1007; lib. XII, epist. 11—*MPL,* LXXVII, 1225-1226.

[21] In a general way this opinion was defended by: Panvinius, *Romani Pontifices et Cardinales S.R.E.,* Appen. *De Episcopatibus, Titulis, et Diaconiis Cardinalium Liber* (*De Episcop.*), p. 51; Polydorus and Ciaconius—Kleiner, *Dissertatio de origine et antiquitate cardinalatus* (*Dissert. de orig. et antiq. card.*), cap. III, nn. 13-14 (Schmidt, *Thesaurus Iuris Ecclesiastici potissimum Germanici sive Dissertationes Selectae in Ius Ecclesiasticum* [*Thesaurus*], II, Dissert. IX); Thomassinus, *Vetus et Nova Ecclesiae Disciplina circa Beneficia et Beneficiarios* (*Eccl. Discip.*), P. I, lib. II, cap. CXV, nn. 2-6; Van Espen, *Ius Ecclesiasticum Universum* (*Ius Eccles. Univ.*), I, P. I, tit. 22, cc. 1, 6, 8; and others cited in Tamagna, *Origini e Prerogative De' Cardinali,* cap. III, n. 44.

[22] Cf. *supra,* p. 293.

[23] Freund-Leverett, *Lexicon,* "cardo."

[24] *Ibid.,* "cardinalis."

[25] "Presbiter autem cardinalis nisi in LXIV testibus non deponatur; diaconus cardinalis urbis Romae nisi in XXVII testibus non condemnabitur . . ."—Actio I, c. 3 (Mansi, *Sacrorum Conciliorum Nova et Amplissima Collectio,* II, 623; c. 2, C. II, q. 4); "Ut diaconi non essent plus vel amplius per parochiarum examen nisi duo et diaconos cardinales urbis Romae septem; . . ."—*Ibid.,* c. 6 (Mansi, II, 625); "A subdiacono usque ad lectores omnes subditi sint diacono cardinali viro reverentissimo, in ecclesia representantes ei honorem . . ."—*Ibid.,* c. 7 (Mansi, II, 625; c. 5, D. XCIII); Ferraris, *Biblioth.,* "Cardinales," Art. I, § 3.

Clement divided the City of Rome into seven Regions; Evaristus distributed the titles in the City of Rome to the priests; Hyginus put the clergy in order and distributed the posts of honor; Fabian distributed the Regions of the city to the deacons; Dionysius gave the churches to the priests; and Marcellus constituted twenty-five titles in the City of Rome, quasi-dioceses, for the baptism and penance of the multitude of pagan converts and for the burial of the martyrs.[26] Panvinius [27] understands the *titles* here spoken of to be the churches of Rome, which were placed in charge of priests, the *chief* of whom in each *title* was called the *cardinal priest.* In like manner, the *Regions* of Rome he understands to be seven sections of the city which were placed in care of deacons, so that each in his own Region would have exclusive care of the poor, the widows, and the orphans, but that when it became necessary to assign more than one deacon to a Region, the first or principal one in each section was called a *cardinal deacon,* and that these were the cardinal priests and deacons mentioned in the Council of Rome in 314.

Confirmation of this opinion is found also in the fifth century, when the term *cardinal Bishop* designated a Bishop who was a residential Superior in contradistinction to one who was only visiting. Pope Gelasius (a. 492-496) wrote to a Bishop Celestine authorizing him to go to another diocese in the capacity of a visitor, not as cardinal Bishop, and to confer the priesthood on Julian, a deacon of the church of St. Eleutherius.[28]

Considerable weight is further added to this opinion by the following observations: a) whenever a see was made vacant another Bishop was sent as *cardinalis sacerdos* or chief shepherd; [29] b) whenever the clergy and people were without a

[26] *Liber Pontificalis,* ed. Duchesne, I, pp. 123, 126, 131, 148, 157, 164. The supposed letter of Pope Anacletus to all Bishops (c. 2, D. XXII), in which the Apostolic See is called *cardo* "because by it all churches are ruled as a door is ruled by its hinge," on which text many authors relied in explaining the origin and meaning of the various derivatives of *cardo,* is Pseudo-Isidorean. — Cf. Hinschius, *Decretales Pseudoisidorianae et capitula Angilrami* (Lipsiae, 1863), p. 83.

[27] *De Episcopatibus, Titulis, et Diaconiis Cardinalium,* pp. 51-52.

[28] ". . . suprascriptum presbiterii honore decorabis, sciturus [eum] visitatoris, nomine te, non cardinalis creasse pontificis."—C. 3, D. XXIV. *Eum* is inserted into the text at the place indicated in the Roman edition of 1582.

[29] Greg. Mag., lib. I, epist. 79—*MPL,* LXXVII, 533; *ibid.,* lib. II, epist. 37—*MPL,* LXXVII, 575; c. 42, C. VII, q. 1; *ibid.,* lib. III, epist. 13—*MPL,* LXXVII, 614-5; cc. 5-6, C. XXI, q. 1.

cardinal Bishop they petitioned the Holy Father to send them one;[30] c) any Bishop, sojourning in another diocese, was forbidden to exercise the authority of a cardinal Bishop over the same;[31] d) after an oratory was built and consecrated, it was a matter for decision whether or not a resident priest should be placed in charge of it as a cardinal priest *(cardinalis presbyter);*[32] e) on one occasion when a church was left not only without a chief shepherd but even without a priest to care for the dying, the neighboring Bishop was commissioned to go there and *ordain* a cardinal priest, two deacons, and in the parishes of the diocese three priests.[33]

From the foregoing it can well be concluded that the expression *to make a cardinal* was not interchangeable in meaning with the expression *to incardinate.*

ARTICLE III

Incardinate AND ITS SYNONYMS

The verb *to incardinate,* as an ecclesiastical expression, seems to have been used for the first time in the sixth century by Pope Gregory I. Various excerpts from his epistles in which it was used, especially in conjunction with the idea of " making a cardinal," are here given.

> Si eum post haec cardinalem facere volueris, nisi Pontificis sui cessionem solemni more meruerit, abstinendum ab omni *incardinatione* memineris, ...[34]
>
> Gregorius Agnello episcopo de Fundis, qui nunc in civitate *incardinatus* est Terracinensi.[35]

[30] Cf. *supra,* p. 295, footnote 16.

[31] Greg. Mag., lib. XIV, epist. 7—*MPL,* LXXVII, 1310; c. 3, D. XXIV.

[32] *Ibid.,* lib. II, epist. 12—*MPL,* LXXVII, 548; *ibid.,* lib. IX, epist. 70—*MPL,* LXXVII, 1007; *ibid.,* lib. XII, epist. 11—*MPL,* LXXVII, 1225-6.

[33] " Gregorius Balbino episcopo Rosellano. Pervenit ad nos quod Populanensis Ecclesia ita sit sacerdotis officio destituta . . . jubemus dilectioni tuae, ut, hujus praeceptionis auctoritate commonitus, memoratae Ecclesiae visitator accedas, ut unum cardinalem illic presbyterum et duos debeas diaconos ordinare. In parochiis vero praefatae Ecclesiae tres similiter presbyteros, quos tamen dignos etc."—Greg. Mag., lib. I, epist. 15 (*MPL,* LXXVII, 460-1).

[34] Greg. Mag., lib. 1, epist. 83 (italics inserted)—*MPL,* LXXVII, 536.

[35] Title to lib. III, epist. 13 (italics inserted)—*MPL,* LXXVII, 614.

C. 5. Relatio cleri simul et populi Terracinae degentis nos ualde letificat, ob hoc, quod de tua fraternitate bona testatur. Et quia defuncto pontifice suo Petro sibi *cardinalem* postulant te constitui *sacerdotem*, eorum desideria necessario conplenda preuidimus . . . Quicquid uero de predictae rebus ecclesiae uel eius patrimonio, seu cleri ordinatione promotioneue, et omnibus generaliter ad eam pertinentibus sollerter atque canonice ordinare facereque prouideris, liberam habebis, quippe ut sacerdos proprius, modis omnibus facultatem.

C. 6. Illud quoque fraternitatem tuam scire necesse est, quoniam sic te predictae Terracinensis ecclesiae *cardinalem* esse constituimus *sacerdotem*, ut et Fundensis ecclesiae pontifex esse *non* desinas, nec curam gubernationemque eius pretereas, quia ita fraternitati tuae sepe dictae Terracinensis ecclesiae curam iniungimus ut Fundensis ecclesiae tibi iura potestatemue nullo modo subtrahamus.[36]

Pastoralis offitii cura nos ammonet, destitutis ecclesiis proprios constituere sacerdotes, qui gregem dominicum pastorali sollicitudine gubernare debeant. Propterea te Iohannem ab hostibus captiuatum Lesimanae ciuitatis episcopum in Squillitana ecclesia *cardinalem* necesse duximus statuere *sacerdotem*, ut et susceptam semel animarum curam intuitu futurae retributionis inpleas. Et licet tua sis hoste inminente depulsus, aliam, que a pastore uacat, debes ecclesiam gubernare, ita tamen, ut si ciuitatem illam hostibus liberam effici et Domino protegente ad priorem statum contigerit reuocari, in eam, in qua *prius ordinatus es*, ecclesiam reuertaris; sin autem predicta ciuitas continua captiuitatis calamitate premitus, in hac, in qua es *incardinatus* a nobis, debeas ecclesia permanere.[37]

Praesentium lator Felix *diaconus*, cum nullatenus in haereticorum dogma lapsus sit, nec a catholica fide discesserit, pravis illectus adversus Constantinopolitanam synodum suspicionibus, in Istricorum se separatione removerat. Qui cum Romam venisset, recepta a nobis juvante Domino ratione, excessum suum, recepta Dominici corporis communione, correxit. Quia ergo, . . . non in haeresim incidit, . . . imbecillitati ejus atque necessitatibus consulentes, maximeque sustentationi ejus pietatis intuitu providentes, in tua Ecclesia Syracusana eum praevidimus *cardinandum*; sive

[36] Greg. Mag., lib. III, epist. 13 *ad Agnellum Episcopum* (italics inserted)—Cc. 5-6, C. XXI, q. 1.

[37] Greg. Mag., lib. II, epist. 37 *Ioanni Episcopo Squillatino* (italics inserted)—*MPL*, LXXVII, 575; c. 42, C. VII, q. 1.

ut officium diaconatus expleat, seu certe ut sola ejusdem officii pro sustentanda paupertate sua commoda consequatur, in tuae fraternitatis volumus hoc pendere judicio.[38]

Fraternitatem tuam a nobis petisse recolimus, ut Gratianum ecclesiae Enafrenae *diaconem* tuae concederemus ecclesiae *cardinandum*. Et quoniam nec episcopum, cui obsecundare debeat, propria habet ecclesia, hoste scilicet prohibente, quo suum debeat ministerium exhibere, peticionem tuam non preuidimus differendam. Idcirco scriptis tibi presentibus eum necessario duximus concedendum, habiturus licentiam illum *diaconum* nostra interueniente auctoritate ecclesiae tuae, Deo propitio, constituere *cardinalem*.[39]

A brief study of these excerpts will show that in every epistle Pope Gregory used the word *cardinate* or *incardinate* to refer to the act of *transferring* a Bishop, priest, or deacon to a church or diocese different from his native church, but always in the capacity of a cardinal, i. e., as a residential Superior. However, the converse is not true, namely, that in his letters every constitution of a cardinal priest or deacon was termed an incardination, especially when the cleric was to be made a cardinal priest or cardinal deacon in the very church of his first ordination.[40]

The Roman Correctors of the Decree of Gratian add weight to this belief,[41] as does also John the Deacon in the seventh century when, writing the life of Gregory the Great, he says of him that he took care to incardinate in vacant sees those Bishops who had to abandon their own sees, and that those whom he could not readily incardinate he sent to other Bishops for sustenance, and that he was very prudent in incardinating

[38] *Ibid.*, lib. IV, epist. 14 (italics inserted)—*MPL*, LXXVII, 684.

[39] *Ibid.*, lib. VI, epist. 11 *Fortunato Episcopo Neapolitano* (italics inserted)—*MPL*, LXXVII, 802; c. 5, D, LXXI. *Cardinandum* is a correction inserted in the Roman edition.

[40] Cf. *supra*, pp. 297, 298, footnotes 28, 33; c. 6, D. LXXIV.

[41] "Cardinandum: Antea legebatur: ordinandum. Emendatum est ex ipsa epistola. Cardinare vero, seu cardinalem constituere (quod est in fine huius capitis), ita videtur B. Gregorius accepisse, ut canonicam translationem significet. Nam quum tempore S. Gregorii canon 6 concilii Chalcedonensis accurate observaretur, ut nullo modo daretur alicui locus in ecclesia (qui nunc titulus vocatur) nisi simul ad eum locum ordinaretur, quum aliquis iam ordinatus, necessitate aliqua in aliam ecclesiam transferebatur, ut in illa in eodem gradu, quo in prima ordinatus erat, deserviret, in secunda dicebatur incardinari; quod ex isto nunc indicato loco patere potest, et ex l. 3, epist. 14 et alibi."—*Notationes Correctorum*, c. 5, D. LXXI.

clerics of other dioceses either into his own diocese or into the dioceses of others.[42]

From the seventh to the end of the eleventh century no variation in the meaning of the term is in evidence.[43]

From the twelfth to the eighteenth century it did not appear in official documents at all, e. g., in the Decretals of Gregory IX, the canons of the Councils, particularly of Trent, Papal Bulls or Letters, or even in the Latin lexicons of the period.[44] Only a few exceptions occur, such as in the provincial Synod of the Greek Maronites held on Mount Libanus in 1736,[45] and in a letter sent to all the Bishops of Etruria in connection with their convention at Florence in 1786-1787.[46]

Widespread use of the term *incardination* along with its correlative *excardination* began only in the latter part of the nineteenth century. It was the Roman Curia which adopted it in its discussions and responses, but which broadened its meaning so as to include the permanent attachment of any cleric or, in later years, even of a lay person to a new diocese after his transfer from another.[47]

[42] *Vita S. Gregorii*, lib. III, §§ 15, 16, 19—*MPL*, LXXV, 133.

[43] " Synodale, ut episcopus alterius civitatis in alia Ecclesia possit *incardinari*."—*Liber Diurnus Romanorum Pontificum*, cap. III, t. 11 (*MPL*, CV, 77); Adrian II, a. 868, ep. 7—Mansi, XV, 823-824; *ibid.*, ep. 11—Mansi, XV, 828; Hincmar, Abp. of Rheims, a. 874, *Capitula in Synodo Rhemis data*, cap. 1—*MPL*, CXXV, 795; John VIII, a. 876, ep. 13 *ad Bituricenses*—Mansi, XVIIa, 13; *ibid.*, ep. 14 *ad episcopos Provinc. Bitur.*—Mansi, XVIIa, 14; Adam, Canon of Bremen, XI cent., *Gesta Hammaburgensis Ecclesiae Pontificum*, cap. 215—*MPL*, CXLVI, 626; Ivo of Chartres, XI cent., ep. 131, *ad Wilgrinum*—*MPL*, CLXII, 140; Urban II, a. 1092, ep. 71—*MPL*, CLI, 356-7; Mansi, XX, 671.

[44] Gerardi Joannis Vosii *Etymologicon Linguae Latinae* (Amstelodami, 1662); Ambrosii Calepini *Dictionarium* (*ed. noviss.*, Lugduni, 1681); Basilii Fabrii Sorami *Thesaurus Eruditionis Scholasticae* (Hagae-Comitum, 1735); *Vocabularium Latinum et Italicum* (Romae, 1792); *Totius Latinitatis Lexicon* Aegidii Forcellini, (Schneelbergae, 1831).

[45] " . . . Nemo presbyterum vel clericum ab aliena dioecesi ad propriam transferat, . . . vel eum in propria *incardinet* ecclesia, nisi consensum dante ordinario . . . "—Italics inserted. *Constitutiones et Canones*, P. III, cap. IV, n. 24 (Mansi, XXXVIII, 193).

[46] " Tutti i sacerdoti, che abbiano benefizio residenziale, dovrebbero essere *incardinati* alla chiesa, dove sia fondato il loro benefizio, . . ."—Italics inserted. Sec. XXI (Mansi, XXXVIII, 1004-5).

[47] S.C.C., *Solutionis seu Excardinationis*, 18 dec. 1869 et 19 feb. 1870—*ASS*, V (1869), 477-478, where the Commentator discusses the word; S.C.C., *Taurinen., Adscriptionis seu Incardinationis*, 25 aug. 1877—*ASS*, X (1877), 485-491; S.C.C., *Viglevanen seu Mediolanen., Excardinationis*, 8 maii 1886—*ASS*, XIX (1886), 122-

America, a vast new missionary field, requiring the acquisition of many priests from abroad, had much to do with the development of the terminology for canonical transfers. In 1829 the First Provincial Council of Baltimore used the classical Latin word *cooptare* (to receive or admit into a body) to designate the transfer and enlistment of a foreign cleric in the service of a church here.[48] This and another expression, namely, *incorporare,* were used here throughout the major part of the nineteenth century until it became the practice of the Church to use the term *incardination* exclusively.[49]

The Code of Canon Law in canon 111, §2, however, has given to the term a more comprehensive meaning than it ever had before. To be *incardinated* now means to be permanently attached or admitted to the clergy of a diocese, whether by transfer from elsewhere or by initial tonsure in one's own diocese.[50]

ARTICLE IV

Excardinate AND ITS SYNONYMS

The preposition *ex* prefixed to the ancient adjective *cardinatus,* already analyzed,[51] gives the notion of one thing being detached from another. *To excardinate* in ecclesiastical language vividly represents the release of a cleric from the

125; S.C.C., decr. "*A primis,*" 20 iulii 1898—*ASS,* XXXI (1898-1899), 49 ss.; *AER,* XX (1899), 179 ff.; S.C. Ep. et Reg., *Viterbien., Excardinationis,* 14 iulii, 1905—*ASS,* XXXIX (1906), 207 ss.; S.C.C., decr. "*Vetuit,*" 22 dec. 1905—*ASS,* XXXVIII (1905-1906), 407 ss.; S.C.C., *Romana et Aliarum,* 15 sept. 1906—*ASS,* XXXIX (1906), 486 ss.; S.C.C., decr., 24 nov. 1906—*ASS,* XXXIX (1906), 600 ss.; *AER,* XXXVI (1907), 292; S.R.R., *Londonen.,* 9 ian. 1912—*AAS,* IV (1912), 249 ss.; S.C.C., *Bismarckien. et Aliarum,* 31 ian. 1913—*AAS,* V (1913), 34 ss.; S.R.R., Decis. XXII, 17 apr. 1913—*Decisiones seu Sententiae,* V, 249 ss.; S.C.C., *Dioecesis T.,* 27 ian., 1917—*AAS,* X (1918), 18 ss.

[48] *Decreta,* n. II—Mansi, XXXIX, 295.

[49] I Plenary Council of Baltimore, a. 1852, *Decreta,* n. 9—Mansi, XLIV, 675; II Provincial Council of New Orleans, a. 1860, *Decreta,* n. 9—Mansi, XLVIII, 23; II Plenary Council of Baltimore, a. 1866, *Decreta,* nn. 108-9, 121, 314—*Conc. Plen. Balt. II Acta et Decreta,* pp. 75, 78, 166; I Provincial Council of Quebec, a. 1851, *Decreta,* n. XIII—Mansi, XLIV, 585; III Plenary Council of Baltimore, a. 1884, *Decreta,* nn. 62-3—*Acta et Decreta Conc. Plen. Balt. III,* p. 32.

[50] Vermeersch-Creusen, *Epitome,* I, n. 202; Wernz-Vidal, *Ius Canonicum ad Codicis normam exactum* (*Ius Can.*), II *De Personis* (2. ed., Romae: Universitas Gregoriana, 1928), n. 58.

[51] *Supra,* p. 293.

diocese to which he antecedently belonged. Though the etymology is old, the term is new. It did not appear in any important Church laws or documents prior to the nineteenth century, and is not mentioned in the major Latin lexicons.[52] After 1865, the Roman Curia used it frequently in the sense just defined, just as it did its correlative *incardination*.[53]

The idea of detaching a cleric from one diocese in order to subject him to another is as old as the establishment of the territorial divisions of the Church. It is informative, however, to note the synonyms which were used to express what is now termed *excardination*. There were many. Very often the words *transire* (to pass over), *transferre* (to transfer), *migrare* (to change one's habitation), *discedere* (to depart), and *recedere* (to go away from) are found in the text of the canons of the various councils, and it is apparent from the context that they signify a canonical change of diocese.[54]

In the Ancient Period of the Church "dimissorial letters" *(litterae dimissoriae)* was recognized as a traditional, accepted term for excardination,[55] though the meaning of dimissorial letters after the twelfth century and also in the Code is vastly different.[56] Sometimes the letters by which a cleric was released from his diocese were called *formatae*,[57] *Apostoli*,[58] or *Com-*

[52] Gerardi Joannis Vosii *Etymologicon Linguae Latinae*; Ambrosii Calepini *Dictionarium*; Du Cange, *Glossarium*; Basilii Fabri Sorani, *Thesaurus Eruditionis Scholasticae*; *Totius Latinitatis Lexicon* Aegidii Forcellini; Harper's *Latin Dictionary*; Freund-Leverett, *Lexicon*.

[53] *ASS*, I (1865), 361-2, note 1; *supra*, p. 301, footnote 47. Summary of responses given by the Bishops of the world on matters of ecclesiastical discipline to be treated in the Vatican Council, Quaest. IX, n. 245—Mansi, XLIX, 354-5; S.C.C., *Resp.* 29 maii 1880—*ASS*, XIII (1880), 522-526.

[54] E. g., IV Counc. of Carthage, a. 398, cap. 27—Mansi, III, 953; Council of Chalcedon, a. 451, c. 10—Mansi, VII, 362; c. 3, C. XXI, q. 2; II Counc. of Nice, a. 787, c. 10—Mansi, XIII, 429, 751; Synod of Szabolcs, Hungary, a. 1092, cap. 18—Mansi, XX, 769; Provincial Council of Tours, a. 1583, tit. 14—Mansi, XXXIVa, 834.

[55] Thomassinus, *Eccl. Discip.*, P. II, lib. I, cap. V, n. 5; Bingham, *Antiq.*, Bk. II, ch. IV, n. 5; Bk. VI, ch. IV, n. 4; Gasparri, *De Sacra Ordinatione*, n. 863; Ojetti, *Synopsis Rerum Moralium et Iuris Pontificii*, II, n. 1805.

[56] Moeder, *The Proper Bishop for Ordination and Dimissorial Letters*, pp. 41, 79 ff.

[57] Thomassinus, *Eccl. Discip.*, P. II, lib. I, cap. V, n. 5; Bingham, *Antiq.*, Bk. II, ch. IV, n. 5.

[58] Du Cange, *Glossarium*, "Apostoli."

mendatitiae,[59] and in the nineteenth century they received still other new names, such as *litterae excorporationis,*[60] *litterae remissoriales,*[61] *litterae discessoriae,*[62] *litterae discessoriales,*[63] and *exeat.*[64]

One of the beneficial effects of the Code was to establish technical terminology in the entire sphere of Canon Law. Because of its specific use in canons 111 to 117, *excardination* is now the sole term employed to designate the perpetual release of a secular cleric from a diocese as a concomitant effect of his canonical attachment to another diocese or of his perpetual affiliation with a Religious Institute.

[59] VI Council of Paris, a. 829, lib. I, cap. 36—Mansi, XIV, 561-2; Glossa in c. 5, X, *de clericis non resident.*, III, 4.

[60] I Provincial Council of Westminister, a. 1852, *Decreta,* cap. XXIX, n. 7—Mansi, XLIV, 750.

[61] S.C.C., 22 iun. 1871—*ASS,* VI (1870), 495.

[62] S.C.C., litt. ency. (*ad Epp. Ital. et Amer.*) 27 iul. 1890—*Collectanea S. C. P. F.,* n. 1734, § 4.

[63] S. C. Consist., decr. "*Ethnographica studia,*" 25 mar. 1914—*AAS,* VI (1914), 182 ss.

[64] III Plenary Council of Baltimore, a. 1884, *Decreta,* n. 67—*Acta et Decreta Conc. Plen. Balt.* III, p. 34.

James T. McBride, J.C.D.

Philadelphia, Pa.

Decrees and Decisions

CANONICAL

Petitions for Indulgences

On May 16, His Excellency, the Most Reverend Apostolic Delegate had the honor to notify the Most Reverend Ordinaries of dioceses and of religious of the following regulation of the Sacred Apostolic Penitentiary, Office of Indulgences:

> Quo magis aestimetur excellentia facultatum et indultorum, quae indulgentias respiciunt quaeque ab hoc S. Tribunali sacerdotibus concedi solent, Rev.mi Ordinarii litteras commendatitias ad rem ne tribuant nisi sacerdotibus, pro quibus speciales militant rationes, *in precibus exponendae.*
>
> Nulla itaque posthac ratio habebitur petitionum, quae ad praefatos spirituales favores obtinendos huic S. Tribunali aliter pervenerint.

Profession of Faith

His Excellency, the Most Reverend Apostolic Delegate, issued in March the following formula of the profession of faith approved by The Sacred Congregation of the Holy Office for the reception of converts.

I .... years of age, born outside the Catholic Church, have held and believed errors contrary to her teaching. Now, enlightened by divine grace, I kneel before you, Reverend Father ..... having before my eyes and touching with my hands the Holy Gospels; and with a firm faith I believe and profess each and all the articles that are contained in the Apostles' Creed, that is: I believe in God, the Father Almighty, Creator of Heaven and Earth; and in Jesus Christ, His only Son, our Lord, who was conceived by the Holy Ghost, born of the Virgin Mary, suffered under Pontius Pilate, was crucified, died and was buried; He descended into hell, the third day He rose again from the dead; He ascended into heaven

and sitteth at the right hand of God, the Father Almighty; from thence He will come to judge the living and the dead. I believe in the Holy Ghost; the Holy Catholic Church; the communion of saints; the forgiveness of sins; the resurrection of the body, and life everlasting. Amen.

I admit and embrace most firmly the apostolic and ecclesiastical traditions and all the other constitutions and prescriptions of the Church.

I admit the sacred Scriptures according to the sense which has been held and which is still held by Holy Mother Church, whose duty it is to judge the true sense and interpretation of the Sacred Scriptures, and I shall never accept or interpret them except according to the unanimous consent of the Fathers.

I profess that the Sacraments of the New Law are, truly and precisely seven in number, instituted for the salvation of mankind, though all are not necessary for each individual: Baptism, Confirmation, Eucharist, Penance, Extreme Unction, Holy Orders and Matrimony. I profess that all confer grace and that of these Baptism, Confirmation and Holy Orders cannot be repeated without sacrilege.

I also accept and admit the ritual of the Catholic Church in the solemn administration of all the above mentioned Sacraments.

I accept and hold, in each and every part, all that has been defined and declared by the Sacred Council of Trent concerning Original Sin and Justification. I profess that in the mass is offered to God a true, real and propitiatory sacrifice for the living and the dead; that in the Holy Sacrament of the Eucharist is really, truly and substantially the Body and Blood together with the soul and Divinity of Our Lord Jesus Christ, and that there takes place what the Church calls transubstantiation, that is the change of all the substance of bread into the Body and of all substance of wine into the Blood. I confess also that in receiving under either of these species one receives Jesus Christ, whole and entire.

I firmly hold that Purgatory exists and that the souls detained there can be helped by the prayers of the faithful. Likewise I hold that the saints, who reign with Jesus Christ, should be venerated and invoked, that they offer prayers to God for us and that their relics are to be venerated.

I profess firmly that the images of Jesus Christ and of the Mother of God, ever Virgin, as well as of all the saints should be given due honour and veneration. I also affirm that Jesus Christ left to the Church the faculty to grant Indulgences and that their use is most salutary to the Christian people. I recognize the Holy Roman, Catholic and Apostolic Church as the mother and teacher of all the Churches and I promise and swear true obedience to the Roman Pontiff, successor of St. Peter, Prince of the Apostles, and Vicar of Jesus Christ.

Besides I accept, without hesitation, and profess all that has been handed down, defined and declared by the Sacred Canons and by the general Councils, especially by the Sacred Council of Trent and by the Vatican General Council, and in a special manner concerning the primacy and infallibility of the Roman Pontiff. At the same time I condemn and reprove all that the Church has condemned and reproved. This same Catholic Faith, outside of which nobody can be saved, which I now freely profess and to which I truly adhere,

the same I promise and swear to maintain and profess, with the help of God, entire, inviolate and with firm constancy until the last breath of life; and I shall strive, as far as possible, that this same faith shall be held, taught and publicly professed by all those who depend on me and by those of whom I shall have charge.

So help me God and these Holy Gospels.

Privileged Altar

By *Motu Proprio* issued May 12 His Holiness Pope Pius XII granted to all members of the clergy throughout the world the extraordinary privilege of the altar whereby at every Mass they celebrate at every altar, during the period from May 13, 1942, to May 13, 1943, they may gain a plenary indulgence to be applied to one of the souls in purgatory.

In his *Motu Proprio* the Holy Father stated that it was his wish to share the great consolation which he has received from the union of prayers on the occasion of his episcopal jubilee.

* * * *

Devotional Publications

The Sacred Congregation of the Holy Office has issued a decree, dated April 17, that is concerned with the publication of certain booklets, pamphlets and leaflets, which, while they contain no formal errors, nevertheless are not entirely in harmony with genuine Christian piety and seek to introduce new forms not in agreement with the decree of the Congregation dated May 26, 1937.

All Bishops, the latest decree says, must therefore entrust to learned and wise men the examination of such publications and instruct that they shall examine them not only with regard to purity of doctrine but also regarding devotional forms they propose. The Bishops are reminded that authorization for publication shall be given only after the utmost caution has been exerted.

* * * *

Radioesthetics

The Sacred Congregation of the Holy Office has published a decree instructing Bishops and religious superiors to forbid their clergy and religious to practice "radioesthetics" with reference to personal circumstances or for purposes of divination.

Penal sanctions are authorized by the decree where necessary or opportune and Bishops and superiors are instructed to report to the Congregation cases of repeated transgression or grave scandal. The decree declares that in its provisions there is no intention of interfering in the scientific question of radioesthetics.

* * * *

An agreement, modifying the Concordat of 1892 between the Holy See and Colombia was signed at the Vatican April 22 by His Eminence Luigi Cardinal Maglione, Papal Secretary of State and Ambassador Dario Echandia of Colombia.

The new agreement regulates the appointment of Bishops, the delineation of dioceses, celebration of marriage, the administration of cemeteries, and the collaboration of the clergy in the civil census.

Generally, the new provisions are in agreement with the principles applied in all modern Concordats, such as those concluded in the Pontificate of Pope Pius XI. The Holy See, in appointing Bishops, engages only to hold previous consultation with the civil authorities to determine whether any political difficulties exist affecting proposed candidates.

In the matter of the marriage ceremony full civil effect is accorded the Sacrament of Matrimony and the full and exclusive competency of Canon Law and ecclesiastical tribunals is recognized in matters affecting the Sacrament.

The administration of cemeteries, which previously had been invested in ecclesiastic authorities now passes to the civil authorities.

The Government of Colombia agrees to make annual grants to major seminaries for the training of candidates for the priesthood.

THE WORLD EMERGENCY

The observance on May 13th of his silver jubilee as a Bishop marked by "the tragic violence" of the war raging throughout the world, Pope Pius XII broadcast by radio to the world another appeal to "conclude peace on the principles of justice and moderation."

The Pope spoke for 45 minutes, following the anniversary Mass in St. Peter's Basilica which he celebrated in observance of his consecration as Archbishop, on May 13, 1917, by the late Pope Benedict XV. His words were carried by shortwave throughout the world, and translations in various languages followed immediately after he had finished.

Today in some countries, Pope Pius said, "those in authority, bent on replacing right by force, trump up against Christians the same 'infringements' of the law which the Caesars of the first century pretended to have found in Peter and Paul and a countless line of innocent victims. The crime alleged against Christians is always the same—their unfaltering loyalty to the King of kings and the Lord of lords. . . ."

* * * *

His Holiness Pope Pius XII in his letter to His Eminence Luigi Cardinal Maglione, Papal Secretary of State, asking that the month of May be made again a time of special supplication, said:

"While the world, trusting solely in the force of arms and most murderous inventions, advances along its bloodstained path, we—saddened by the immense carnage and driven by the love of the Universal Father—do not limit ourselves to the indication of the most convenient ways for real peace and an order of things based on the principles of Christian justice, but repose our full confidence in God and raise our supplicating hands to Him, at the same time exhorting all our children scattered over the world to unite their prayers with ours."

The duty of all Catholics to continue to strive unceasingly, through prayer, work and sacrifice, to prepare themselves for that day when a misguided and strife-torn world will turn again to God was emphasized by His Holiness Pope Pius XII in a discourse on June 22 with 22 members of the Sacred College of Cardinals. The Holy Father was responding to greetings which the Cardinals extended to him on his name day.

* * * *

The Japanese Government at Tokyo has announced officially that Ken Harada has been appointed special envoy to the Vatican with the rank of minister.

With regard to the Philippine Islands, in which the people of the United States are intensely interested, inquiries brought the response that nothing has been changed regarding the status of the Apostolic Delegation to the Islands. No change is contemplated. Most Rev. William Piani, the Apostolic Delegate to the Philippines, remains as Delegate and will continue to fulfill his duties.

Most Rev. Paul Marella remains as Apostolic Delegate to Japan.

* * * *

Dr. Cheou-Kang Sie, Charge d'Affaires of the Chinese Legation at Bern, Switzerland, has been nominated Chinese Minister to the Vatican and the Holy See has accepted the nomination.

* * * *

The Holy See must remain neutral in the world conflict and, following its traditional policy, accept an ambassador from any country that chooses to send one to it, Most Rev. Francis J. Spellman, Archbishop of New York, declared, speaking at the Solemn Mass according to the Byzantine Rite offered in St. Patrick's Cathedral as a highlight of the fourth annual conference on Oriental Rites and Liturgies.

* * * *

Drawn into an all-out war in defense of our rights and liberties, the American people "are preparing to achieve that victory upon which may be built a firm structure of peace and freedom," President Franklin D. Roosevelt said in a Proclamation setting aside Monday, April 6, to be observed throughout the nation as "Army Day."

* * * *

The headquarters of the Philippine Commonwealth Government in exile was established in Washington by President Manuel Quezon and his war cabinet on May 15.

* * * *

Dr. Carlton J. H. Hayes, of New York, Catholic educator and historian, has been nominated by President Roosevelt to be Ambassador to Spain, succeeding Alexander W. Weddell, who retired because of ill health. Dr. Hayes has been active in the Catholic Association for International Peace, and is Catholic co-chairman of the National Conference of Jews and Christians. The Spanish Government has expressed its approval of the appointment.

President Manuel Prado of Peru, during his visit to the United States, at the U. S. Military Academy, West Point, N. Y., visited the Catholic Chaplain, Rev. George Murdock; at the Cathedral, New York, he was greeted by Bishop John F. O'Hara, C.S.C., Military Delegate of the Armed Forces; at Fordham University he received the honorary degree of Doctor of Laws; and with his entire staff he assisted at Mass in St. Matthew's Cathedral, Washington, D. C. Dr. Edwin Ryan, professor of South American History at The Catholic University of America, gave the sermon.

* * * *

Pan-Americanism and Hispanism are not necessarily contradictory terms. This is one of the points established in an editorial on the Rio conference published in *Criterio,* widely read Argentine Catholic weekly, and written by its director, Rt. Rev. Msgr. Gustavo J. Franceschi. There are some persons, he says, who think that "if we wish to remain faithful to what were the origins of the Ibero-American nations, we must abhor what is non-Spanish." The editor "thanks God that we can be politically and socially Americans—and even Pan-Americans—without repudiating the heritage that has given us our distinctive character as an ethnic group."

"And as to the Conference at Rio de Janeiro? Does this meeting have any relation to the contradictory theories of closed and open societies?"

"Yes; it constitutes an incomplete and imperfect but nevertheless real and positive manifestation of the spirit of cooperation among nations, especially of the doctrine of *open* societies." The imperfections he attributes to human frailty and classes as non-essentials since *the* essential feature of the conference is: "An entire Continent, embracing more than 200,000,000 people, comprising 21 nations, speaking four languages, has realized that—without any one of its parts losing its respective individuality—it is possible to organize a definite supra-national unity.

* * * *

The Bishops' Relief Committee, which last year made available over one million dollars for distribution to the distressed war victims in more than a dozen countries, $600,000 of which was disbursed through His Holiness Pope Pius XII, sponsored its 1942 "War Emergency Relief Collection" in most dioceses of the country on Laetare Sunday, March 15.

Announcement of the appeal date was made by Most Rev. Edward Mooney, Archbishop of Detroit and chairman of the Administrative Board of the National Catholic Welfare Conference.

An additional sum of $100,000 to be used in the relief of Polish refugees in Russia was made available by the Bishops' Relief Comittee at a special meeting held in Washington late in April. This allocation brings to approximately three-quarters of a million dollars the moneys which the Bishops of the United States have made available for Polish relief in recent months.

* * * *

"God-given rights," and principles that have had "their noblest practical exemplification in history in the Government of the United States, are at stake in this war and every real American knows he must fight for them

even to death, a nationwide radio audience was told March 22 by Most Rev. Francis J. Spellman, Archbishop of New York, in a program sponsored by the Knights of Columbus, Fourth Degree.

* * * *

Designation of May 17 by Catholic, Jewish and Protestant leaders as USO Sunday "emphasizes the background of religious principles characteristic of each USO agency," says a statement to Catholic priests in the United States over the signature of Most Rev. Edward Mooney, Archbishop of Detroit and president of the Board of Trustees of the National Catholic Community Service, USO member agency.

The statement declares that the USO and its member agencies have more than kept their promise during the first year of operation, now having 637 service clubs, troops-in-transit lounges and mobile units for service men.

* * * *

Under the condition of nationwide employment of women in war industries adherence to "the traditional American pattern" of "conserving the home life of children" is strongly urged in a joint statement just issued by officials of the National Catholic Welfare Conference and the National Conference of Catholic Charities.

The officials who issued the statement following several conferences are: Rt. Rev. Msgr. Michael J. Ready, general secretary of the National Catholic Welfare Conference; Rt. Rev. Msgr. John O'Grady, secretary of the National Conference of Catholic Charities; Rev. George Johnson, director of the Department of Education, N.C.W.C., and William F. Montavon, director of the N.C.W.C. Legal Department.

* * * *

Rev. George Johnson, director of the Department of Education of the National Catholic Welfare Conference, was appointed a member of the Committee on Problems and Plans in Education of the American Council on Education, which at its meeting in Chicago urged the Federal Government to finance the education of gifted youth needed for specialized war work.

* * * *

On April 14th the Treasury Department announced the appointment of 13 prominent members of the Catholic clergy to membership on the National Savings Bond Minute Men Committee.

With representatives of the Protestant and Jewish churches, the Catholic clergymen will bring the message of Savings Bonds and Stamps to radio audiences in various sections of the country.

Following are the names of the Catholic clergymen appointed:

Rt. Rev. Msgr. Michael J. Ready, general secretary, National Catholic Welfare Conference, Washington; Rt. Rev. Msgr. Robert F. Keegan, executive director, Catholic Charities, Archdiocese of New York; Rt. Rev. Msgr. Peter M. H. Wynhoven, president, Catholic Press Association of the United States, New Orleans; Rt. Rev. Msgr. Richard L. Quinlan, supervisor of schools, Archdiocese of Boston; Rt. Rev. Msgr. George J. Casey, chancellor, Archdiocese of Chicago; Very Rev. Msgr. Edward J. Hickey, chancellor, Archdiocese of Detroit; Very Rev. Msgr. John P. Cody, chancellor, Archdiocese

of St. Louis; Very Rev. Msgr. James H. Griffiths, vice chancellor, Diocese of Brooklyn; Very Rev. Robert I. Gannon, S.J., president, Fordham University; Very Rev. Hugh O'Donnell, C.S.C., president, of Notre Dame; Rev. Ignatius Smith, O.P., The Catholic University of America, Washington; Rev. Albert J. Murphy, director of Catholic Charities, Diocese of Cleveland, and Rev. James T. O'Dowd, superintendent of schools, Archdiocees of San Francisco.

SECULAR

On June 8th, the United States Supreme Court handed down a 5-4 decision involving the first article of the Bill of Rights (Amendment 1 of the Constitution), which reads in part:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."

Amendment 14 of the Constitution makes Amendment 1 applicable to the State governments as well as to the Federal Congress.

The case in issue came up to the Supreme Court from the State supreme courts of Arkansas and Arizona. Opelika, Ala.; Fort Smith, Ark., and Casa Grande, Ariz., had laws requiring peddlers of all descriptions to pay license fees to the town governments. Jehovah's Witnesses, peddling tracts and phonograph records in these towns, ran afoul of the town license laws.

The question for the Supreme Court to decide was: Did these towns violate these people's constitutional rights of freedom of religion and press by insisting that they pay license fees as peddlers?

In this 5-4 decision, the Supreme Court decided that these rights had not been violated; that the town governments had the right to license peddlers of religious literature.

Associate Justice Stanley Reed delivered the majority opinion. It was concurred in by Associate Justices J. F. Byrnes, Felix Frankfurter, R. H. Jackson and O. J. Roberts.

Chief Justice Harlan F. Stone dissented and was joined in this opinion by Associate Justices H. L. Black, W. O. Douglas and Frank Murphy.

* * * *

On June 1st the Supreme Court handed down the decision that the "Habitual Criminal Sterilization Act" of Oklahoma is unconstitutional. The Oklahoma Act provided for the compulsory sterilization of any person convicted for the third time of a crime involving moral turpitude, and the Court ruled that it violated the "equal protection" clause of the 14th Amendment to the Constitution. As to the power claimed by the state to impose sterilization, the Court pointed out that this "involves one of the basic civil rights of man," and that it "may have subtle, far reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."

* * * *

Treasury Department proposals which it was charged would have seriously affected the future operation of religious, charitable and educational institu-

tions in the United States have been voted down by the Committee on Ways and Means of the House of Representatives in its consideration of the new tax bill.

The first proposal was that charitable, religious and educational institutions at present exempt from corporation income tax, be subjected to that tax on income derived from a trade or business owned and operated by the corporation but not necessarily incident to its tax-exempt activities.

The second proposal was that money bequeathed or transferred for special charitable purposes, now deductible in computing the estate tax, be limited to a specific percentage of the decedent's estate.

The House Committee on Ways and Means has rejected both of these proposals. Vigorous opposition to the proposals was voiced in committee meetings by Representative John D. Dingell, of Michigan, and Representative Raymond S. McKeough, of Illinois.

Shortly after Randolph Paul, acting as tax adviser to the Secretary of the Treasury, appeared before the Congressional Committee and put forward these recommendations for the new tax bill, the Administrative Board of the National Catholic Welfare Conference vigorously protested them.

* * * *

The constitutionality of Connecticut's 63-year-old law making the practice of birth control a criminal offense was upheld for the second time in two years by the State Supreme Court when it ruled in a 3-to-2 decision that it is illegal for a physician to prescribe the use of contraceptives in any circumstances.

The State Legislature last year, after considerable debate, had refused to amend the statutes. This stand indicated "beyond doubt its intention that they should apply as written", the court's majority opinion ruled.

* * * *

Curses and other objectionable words and epithets are not included in the scope of constitutional guarantees of free speech, the Supreme Court ruled unanimously March 9 in sustaining a conviction under a New Hampshire law which forbids any person's addressing to another "any offensive, derisive or annoying word."

The decision affected a member of Jehovah's Witnesses who was sentenced to serve six months in jail for allegedly addressing offensive words to a Rochester, N. H., police officer.

* * * *

H. R. 2523 and S. 393 and S. 413, bills in Congress looking to the extension of federal legislation against the transportation of indecent reading matter, died in committee early in March. They had been protested shortly after their introduction by Rt. Rev. Msgr. Michael J. Ready, because they did not include bans against the carrying of contraceptive literature. Msgr. Ready believed that the purpose of the bills could be achieved simply by prohibiting in an amendment to Section 245 of the Criminal Code of the United States the interstate and foreign transportation by private carrier of the articles now stated to be obscene in that Section.

The Maryland Court of Appeals has upheld a decision of a lower court which ruled that laws empowering the Commissioners of St. Mary's Country to provide transportation for parochial as well as public school children are valid.

The Bill is Chapter 609 of the Laws of 1941, to be Section 202C of Article 19 of the Code of Public Local Laws of Maryland.

* * * *

Banned since 1899, religion has been restored, on a non-compulsory basis, to the schools of Brazil. The restoration has been effected through the revision of the curriculum of secondary and senior schools made after several years of careful study by a committee appointed by the government and including Rev. Leonel Franca, S.J., and Alceu Amoroso Lima, president of Brazilian Catholic Action.

Co-education, which is not formally banned by the new reforms, is to be avoided and where it is adopted classes for boys and girls are to be held separately.

Reviews of Periodicals

Philosophy of Law and Government

W. Farrell, O.P., and M. Adler, "The Theory of Democracy" (continued)—*The Thomist,* IV (1942), 286-354.

P. J. Holloran, "World Peace and Benedict XV"—*The Modern Schoolman,* XIX (1942), 53-56 (reviews Pope Benedict's teaching on disarmament, arbitration, sanctions and the organized community of states).

J. Murray, "Pope Pius XII and Peace"—*The Month,* CLXXVIII (1942), 60-71 (reviews the Holy Father's teaching on peace, contained in the Encyclical *Summi Pontificatus* and in the Christmas allocutions of 1939, 1940 and 1941).

W. D. Lamont, "Duty and Interest"—*Philosophy, the Journal of the British Institute of Philosophy,* XVI (1941), 339-355; XVII (1942), 3-25 (according to the author, duties would be always correlative to rights, rights ought to be defined in relation to interests, and duties therefore would draw their significance ultimately from interests. Any different concept of duty is said to "become utterly unintelligible").

Schilling, "Die Eigentumslehre Leos XIII. und Pius' XI."—*Theologische Quartalschrift,* CXXI (1940), 205-210 (the teaching on property of Leo XIII and that of Pius XI are shown as being in complete harmony; recent attempts to construe the doctrines of the *Quadragesimo anno* in a modern "dynamic" sense, as opposed to an allegedly "individualistic" and "static" doctrine of the *Rerum novarum,* are refuted).

Church and State

K. J. Alter, Bishop of Toledo, "Church and State, diarchy or dualism"—*The Ecclesiastical Review,* CVI (1942), 321-340 (reviews, on a historical background, the teaching of the Church on the relations of the two powers, with special reference to Leo XIII's encyclicals and to the postulate of freedom of the Church. The meaning of the medieval claim of a *iudicium in temporalibus* and the meaning of the *potestas indirecta* of the Church are explained).

F. R. Hoare, "Catholicism and the modern state, I: Catholicism and politics"—*The Homiletic and Pastoral Review,* XLII (1942), 519-526; "II: The three types of Church-state relationship"—*ibid.,* 628-636.

Pastors

F. Gilles, O.F.M., "Os religiosos e as paróquias"—*Revista Eclesiástica Brasileira,* I (1941), 712-740 (The religious and the parishes; a discussion on conferral of parishes to religious and its effects, on the individual religious as parochial vicar, his nomination, removal and substitution, on his duties in the religion and in the administration of the parish).

Religious

A. C. Ellis, S.J., "The vow of poverty in the Code of Canon Law"—*Review for Religious,* I (1942), 15-26 (discusses canons 580 ff. and 568 ff.).

A. C. Ellis, "Profession of a novice in danger of death"—*Review for Religious,* I (1942), 117-122 (a commentary on the decree of the S. Congr. Rel., of December 30, 1922, which allows admission of a dying novice to conditional profession, determines the spiritual effects of that profession in case of his death, and the lack of any effect in case of recovery).

A. C. Ellis, "The general chapter of elections in a religious congregation"—*Review for Religious,* I (1942), 146-156 (a summary of the pertinent norms of the Code).

C. Santini, S.J., "A companhia de Jesús, ordem on congregação?"—*Revista Eclesiástica Brasileira,* I (1941), 757-777 (reports on the old controversy whether the Society of Jesus belongs to the religious orders or the religious congregations, and summarizes the evidence for its nature as true order).

B. Puschmann, "Professablegung und ausserordentliche Dienstpflicht"—*Theologisch-praktische Quartalschrift* XCIV (1941), 64-65 (discusses whether the decrees of the S. Congr. Rel., forbidding admission to perpetual vows before fulfilment of ordinary military service [cf. *AAS,* III, 37 and XI, 321], ought to be applied to extraordinary military service, as in wartime; the author's answer is in the negative and refers for practical solution to can. 574, § 2).

Sacraments

F. König, "Zelebration ohne Ministranten"—*Theologisch-praktische Quartalschrift,* XCIV (1941), 51-54 (discusses the circumstances in which celebration of Mass without server is allowed).

J. P. Donovan, "Is the interpretation of can. 900 also dated?"—*The Homiletic and Pastoral Review,* XLII (1942), 431-436 (insists that the Instruction of the Holy Office of July 13, 1916, on the absolution from reserved sins, is not valid after the code, and that can. 900, 3° is effective also when the penitent goes into a territory where the same sin is reserved; according to the author, this opinion would not be contrary to the Response of the Commission for Authentic Interpretation which declares a *peregrinus* to be bound by reservations made for the territory of his sojourn, since the Commission had been asked only about can. 893, not about can. 900).

Marriage

J. P. Kelly, "Procedural law and the Nesqually Instruction"—*The Homiletic and Pastoral Review,* XLII (1942), 540-551; J. P. Donovan, "Yet again the Nesqually Instruction"—*ibid.,* 734-740 (the authors continue their dispute, cf. The Jurist, I [1941], 355; II [1942], 191 f.).

W. E. Donnelly, S.J., "The convalidation of non-Catholic marriages"—*Theological Studies,* III (1942), 189-202 (rejects the new theory, proposed by Cappello in *Ius Pontificium,* XX [1940], 25-27, viz. that baptized non-Catholics be not subject to the norms requiring renewal of consent in simple convalidation, can. 1133 ff.).

Liturgy

J. Nabuco, "The form of vestments"—*The Ecclesiastical Review,* CVI (1942), 241-254 (holds that the use of the ample or "gothic" chasuble is allowed without indult, and that the Decree of the S. Cong. Rit., of December 9, 1925, which requires consultation with the Holy See for a departure from the *usus receptus* of the Roman Church, is to be interpreted in a strict sense).

History of Canon Law

* A. Grazioli, "La giurisdizione metropolitana di Milano a Verona all'epoca di S. Ambrogio"—*La Scuola Cattolica,* IV (1941?), 373-379 (on the metropolitan jurisdiction of Milan over Verona at the time of St. Ambrose).

A. Gwynne, S.J., "St. Anselm and the Irish Church"—*The Irish Ecclesiastical Record,* 5, LIX (1942), 1-14.

T. P. McLoughlin, C.S.B., "The prohibition of marriage against Canons in the early twelfth century"—*Mediaeval Studies,* III (1941), 94-100 (from various sources, the author makes evident that at this period there existed, beyond the general laws against marriages of clerics in major orders, particular legislation forbidding the marriage of *canonici,* and that the name of "canons" was applied not only to the clergy composing the chapters, but also to certain clerics attached to the cathedrals, outside the chapters).

H. G. Richardson, "The Oxford Law School under John"—*Law Quarterly Review,* LVII (1941), 319-338 (on a fragment, preserved in the Walters Art Gallery, Baltimore, Ms. W. 15, which contains a curious mixture of forms for procedural documents, both civil and canonical, and of portions of an *ordo iudiciorum.* The author shows that this writing was composed for didactic purposes at Oxford, in the reign of King John, on the basis of an earlier formulary that might originate from Northampton, and under the influence of Bolognese teaching. The significance of the fragment for the increase of our knowledge on the teaching of Canon Law, Roman Law, and notarial matters in medieval Oxford, is amply illustrated).

G. B. Flahiff, C.S.B., "The use of prohibitions by clerics against ecclesiastical courts in England"—*Mediaeval Studies,* III (1941), 101-116 (the frequent use of royal writs of prohibition by clerics in the thirteenth century shows that the rivalry between the common law courts and the courts christian should not be viewed with too simplified an application of modern concepts, as an instance of quarrels between Church and State, since in these medieval conflicts we find on both sides clerics as well as laymen).

A. Parsons, O.F.M.Cap., "Bernardine of Feltre and the *Montes Pietatis*"—*Franciscan Studies,* XXII, 1 (March, 1941), 11-32; "The economic significance of the *Montes Pietatis*"—*ibid.,* XXII, 2 (September, 1941), 3-28 (on Bl. Bernardine's part in the struggle against usury; on the canonical and theological discussions of the fifteenth and sixteenth centuries, regarding the interest charged by the *Montes Pietatis*).

W. F. Rea, "A good word for the Inquisition"—*The Month,* CLXXVIII (1942), 32-40 (without denying "the harm wrought by the Inquisition" in

general, the author points out one of its good results: "this was its continual and unflinching opposition, in spite of the clamor which filled all Europe, . . . to the savage and panic-stricken anti-witchcraft campaign . . . ;" some characteristic and mostly overlooked examples from Spain are given).

Bro. Philip Neri, C.F.X., "Baptism and manumission of Negro slaves in the early Colonial period"—*Records of the American Catholic Historical Society of Philadelphia,* LI (1940), 220-232 (the effects of baptism upon the status of slaves are reviewed in a historical summary. According to the author, the idea of a *manumissio per baptismum,* i. e., of baptism as automatically freeing the slave, originated in protestant times; it led the early protestant colonists to the practice of withholding religious instruction from Negroes, while in Catholic Louisiana slaves were baptized without a question, since the Church in disapproving the new slavery of the Colonies made no distinction whether the slaves be pagan or christian).[1]

History of Roman Law

W. W. Buckland, "Contrectatio"—*Law Quarterly Review,* LVII (1941), 467-474 (investigates the significance of bodily contact, *contrectatio,* in the construction of the delict of theft in Roman law.)

F. Pringsheim, "The character of Justinian's legislation"—*Law Quarterly Review,* LVI (1940), 229-246.

R. Taubenschlag, "The legislation of Justinian in the light of the papyri"—*Byzantion,* XV (1941), 280-295.

J. H. Wigmore, "Lanfranc, the prime minister of William the Conqueror: was he once an Italian professor of Law?"—*Law Quarterly Review,* LVIII (1942), 61-81 (discusses the pros and cons of the old question whether Archbishop Lanfranc, before he came to Normandy, studied and taught civil law at the school of Pavia; with digressions on historical hermeneutics. The author's conclusion is: *non liquet*).

* G. Cencetti, "Sulle origini dello studio di Bologna"—*Revista Storica Italiana,* 5, V (1940), 248-258 (the article, as reviewed in *Historische Zeitschrift,* CLXIII [1941], 408, dates the beginnings of the Bolognese school, and particularly of Irnerius' teaching, about 1111-1115 A. D.).

History of Byzantine and Russian Church Law

G. Vernadsky, "Byzantium and Southern Russia: The Eparchy of Gothia"—*Byzantion,* XV (1940/41), 67-76 (investigates the early history of the Byzantine church province of Gothia).

P. J. Alexander, "A chrysobull of the emperor Andronicus II Palaeologus in favor of the see of Kanina in Albania"—*Byzantion,* XV (1940/41), 167-207 (an original rescript of emperor Andronicus II, dated June, 1307, and pre-

[1] The origins of the so-called *manumissio per baptismum* still need much investigation. The institute can be linked with the protestant revolt only when negative results will have been obtained after a thorough research in the medieval authors on C. (1, 10) 1; 2, on cc. 12 sq., D. LIV, and on the decretals *De servis non ordinandis* (X, I, 18). Schmalzgrueber, I, iii, 18, n. 1 holds that Christians can't be slaves, *nam christiani omnes in honorem characteris baptismalis sunt liberi.* (Reviewer's note).

served in the Pierpont Morgan Library, New York, Ms. M398, is here for the first time described, edited and illustrated with a detailed commentary. The document contains a confirmation of the possession of the bishopric and various responses on judicial problems submitted by the bishop).

M. Spinka, "Patriarch Nikon and the subjection of the Russian church to the state"—*Church History,* X (1941), 347-366 (tells the history of Patriarch Nikon, 1605-1666, who tried to bring about a reformation of the Russian church, on the base of the *Epanagoge,* a ninth-century Byzantine collection; his hellenizing tendencies, his extreme severity against delinquent clerics, and particularly his doctrine on the superiority of the patriarch over the tsar in spiritual and canonical matters, caused eventually his fall; he was deposed in an uncanonical procedure, and with that event, the victory of Cesaropapism was secured in Russia).[2]

Anglican Church Law

F. D. Price, "The abuses of excommunication and the decline of ecclesiastical discipline under Queen Elizabeth"—*English Historical Review,* LVII (1942), 106-115 (illustrates the decline of the authority of ecclesiastical courts in the Church of England, and the ineffectiveness of their excommunications, with documents from the act books of the consistory court of Gloucester).

F. W. Buckler, "The establishment of the Church of England, its constitutional and legal significance"—*Church History,* X (1941), 299-346 (the history of the established church is summarized, with emphasis laid upon the principle that the Law of England is the sole and unimpeachable rule for the church. In reviewing the Middle Ages, the author asserts that all papal power, and all the theories of an autonomy of the spiritual sphere, have been invented by Pseud-isidor, and that the forged decretals "are the foundation of all subsequent editions of the *corpus canonum* [*sic*] or body of canon law." Consequently, any protests of anglican bishops against any measures of the state are condemned as "pseud-isidorian" offences against the spirit of the reformation; in one certain case, the author speaks of "a flagrant instance of hyper-pseudo-isidorian episcopocratic [*sic*] usurpation" by the anglican bishops of Canada).

B. H. Jones, "Marriage and divorce"—*Anglican Theological Review,* XXIV (1942), 38-62 (discussing the recent anglican controversies on re-marriage of divorced people, the author advocated a standard for the Episcopalian church "of forbidding the clergy to take any part whatever in the contraction or benediction of marriages which the Church's basic principles do not permit it to approve". Any other stand would destroy its prestige, the author concludes, "just as surely as the Church of Rome has totally thrown away public respect and influence by pretending to sanction no divorce whatever, and then finding subtle reasons for annulling practically any marriage whose parties are willing to expend the time and money necessary to do so").

[2] The reader will not fail to notice the tragical irony of the fact that Nikon fell chiefly for his attempt to realize the Catholic doctrine of the Two Powers which he believed to be truly Byzantine. The author's anti-Catholic insinuations (p. 361 f.), viz. that the protagonist against Nikon in the trial of 1666 was secretly an Uniate and paid by the Propaganda, is therefore intrinsically improbable (Reviewer's note).

Annotations to Recent Roman Documents

S. C. Conc., *Response* of July 19, 1941 (concerning the *missa pro populo* on particular English feast days).
—P. J. H.—*The Clergy Review,* XXI (1941), 362.

S. C. Rel. and S. C. Sem., *Decree* of July 25, 1941 (on admission of ex-religious to a seminary, and of ex-seminarist to a religious order).
—E. J. Mahoney, *The Clergy Review,* XXI (1941), 364.

Pont. Comm. Cod. Can. Auth. Interpr., *Response* of July 8, 1940 (cf. The Jurist, II [1942], 197).
—J. Haring, *Theolog.-praktische Quartalschrift,* XCIV (1941), 63.

Cases and Consultations

Dispensation from vows requested, granted, but then refused (p. 48: J. J. Nevin.
Concubinaries attempting civil marriage (p. 50: J. J. Nevin).
Priest attending funeral (p. 57 nr. 3: J. Carroll).
—*The Australasian Catholic Record,* XIX (1942).

Impediment of *ligamen* (p. 257: J. S. Sánchez).
Pastor's right to renounce stipends and stole fees? (p. 259: M. Gómez).
Bination (p. 267: G. Aguilar).
Eucharistic fast (p. 268: L. Vega).
Tithes and first fruits (p. 365: M. Gómez).
Dispensation from fasting (p. 372: L. Vega).
—*Christus, Revista mensual,* VII (1942).[3]

Freedom to marry (p. 356).
Instructions from Roman Congregations, binding force (p. 357).
Nuptial blessing on All Souls' Day (p. 358).
Marriages of converts (p. 359).
—E. J. Mahoney—*The Clergy Review,* XXI (1941).

Erection of stations of the Cross (p. 128).
Bishop's throne (p. 130).
Parish hall in church basement (p. 131).
—E. J. Mahoney—*The Clergy Review,* XXII (1942).

Diversities of time (p. 217: R. J. Kearney).
Abstinence for workingmen and their families (p. 225).
Hearing of confessions while on vacation (p. 292: C. V. Bastnagel).
Doubtful baptism and can. 1127 (p. 301).
Custom limiting a third sister in the chapter of the Sisters of Mercy (p. 302).
Valid consecration at Mass (p. 309).
Pronouncing religious vows at the time of receiving holy communion (p. 310).
Period between apparent and real death (p. 383).
Administering Holy Communion to the sick in the evening (p. 392).
—*The Ecclesiastical Review,* CVI (1942).

Distribution of Holy Communion in hospital wards (p. 474).
Delegation to witness marriages outside proper diocese (p. 475).

[3] Spanish titles translated by the reviewer.

Administrators and obligation to celebrate *pro populo* (p. 475).
Occasional attendance at non-Catholic Bible classes (p. 476).
Obligation to fulfill Mass intentions (p. 477).
How must the banns of matrimony be published? (p. 565).
Official birthplace of infant born in hospital (p. 566).
Distant pasture Catholics (p. 668).
Shirkers of parish support? (p. 669).
Scandalous burials? (p. 757).
A case of sterilization (p. 758).
Catholic patients and abstinence (p. 759).
Excommunication for civil marriage (p. 760).
Excerpts from forbidden books (p. 763).

—J. P. Donovan—*The Homiletic and Pastoral Review,* XLII (1942).

Mass without server (p. 460: J. McCarthy).
Obligations in regard to pious bequests (p. 466: J. McCarthy).
Allocation of stole fees (p. 468: M. J. Fallon).
Interpretation of Armagh statute, nr. 31 (p. 470: M. J. Fallon).
Reckoning of triennial period of office of religious superior (p. 471: M. J. Fallon).
Reservation of sins (p. 557: J. McCarthy).
Delegated jurisdiction for hearing confessions outside the diocese (p. 560: M. J. Fallon).
November offerings, a diocesan statute (p. 564: M. J. Fallon).

—*The Irish Ecclesiastical Record,* 5, LVIII (1941).

Moral certainty regarding the fulfilment of the *cautiones* in a mixed marriage (p. 74: J. McCarthy).
Doubt regarding validity of delegation (p. 84: M. J. Fallon).
Erection of quasi-parishes (p. 86: M. J. Fallon).

—*The Irish Ecclesiastical Record,* 5, LIX (1942).

Questions and answers.

—*Review for Religious,* I (1942), 68-70; 141-142; 211-216.

Missa versus populum (p. 837: Frei Aleixo, O.F.M.).
Erection of stations of the Cross (p. 841: H. Borges).
Election of vicar capitular (p. 845: Frei Aleixo).
Canonical obedience (p. 848: Frei Aleixo).
Jurisdiction for hearing confessions (p. 851: Frei Aleixo).
Rome and the first communion of children (p. 857: H. Borges).
Gothic chasuble (p. 864: Frei Aleixo).
Non-acceptance of a rescript of secularization, or of dispensation from simple vows (p. 866: P. M. Lucena).

—*Revista Eclesiástica Brasileira,* I (1941).[4]

Stephan Kuttner

The Catholic University of America

[4] Portuguese titles translated by the reviewer.

* Article not seen by the reviewer.

Chronicle

GENERAL

Celebrated by the Most Reverend Apostolic Delegate, with Hon. Myron C. Taylor, President Roosevelt's personal representative at the Vatican in attendance, a Solemn Pontifical Mass in the National Shrine of the Immaculate Conception, on the campus of The Catholic University of America, May 14, featured the observance, in the nation's capital, of the Silver Episcopal Jubilee of His Holiness Pope Pius XII.

* * * *

Catholics in the United States, Alaska and the Hawaiian Islands now number 22,556,242 according to the Official Catholic Directory for 1942, just issued. With all of the archdioceses and dioceses this year showing gains, this figure represents an increase of 263,141 over last year.

Archdioceses with Catholic populations in excess of one million are Chicago with 1,543,471; New York with 1,111,718, and Boston with 1,065,969. Brooklyn with 984,905, continues as the largest diocese numerically.

* * * *

The circulation of the American Catholic press is 9,125,655 today, and this represents an increase of nearly 2,000,000 over the last ten years. At the same time, the number of publications of the Catholic press in this country has grown by 68 in the last ten years, and is now 332.

These facts are revealed in the 1942 " Catholic Press Directory ", just issued.

* * * *

According to the latest *Annuario Pontificio* there are 459 apostolic vicariates, prefectures and missions. The number of priests in the missions has increased from 20,496 to 20,578, and the Brothers from 8,414 to 8,514. The drop in the number of Sisters is from 50,245 in 1940 to 44,895 in 1941.

During the Pontificate of His Holiness Pope Pius XII, 70 new ecclesiastical jurisdictions have been set up: 28 residential Sees and 41 Apostolic Vicariates, Prefectures and Missions.

During 1941 there was no change in the number of Nunciatures (38), but the number of Apostolic Delegations has increased from 22 to 24. Diplomatic representation at the Vatican remains the same; 35 nations, the Sovereign Order of Malta, and the personal representative of the President of the United States, Myron C. Taylor, with the rank of ambassador, and Harold Tittman as charge d'affaires.

* * * *

The death of His Eminence Tommaso Pio Cardinal Boggiani, Chancellor of the Holy Roman Church, and of His Eminence Alfred Cardinal Baudrillart, reduces the number of members of the Sacred College to 50.

Freedom of conscience is the birthright which Americans must defend "against every totalitarian and pagan assault," President Franklin D. Roosevelt said in a letter to Most Rev. John B. Peterson, Bishop of Manchester and president general of the National Catholic Educational Association, on the occasion of its 39th annual convention in Chicago, April 7-11.

At the closing session Bishop Peterson was re-elected president general. All other officers were re-elected.

The delegates, 5,000 in number, were honored by a Papal message congratulating them for their outstanding achievements in Catholic education.

* * * *

Most Rev. William D. O'Brien, Auxiliary Bishop of Chicago, has been confirmed in the office of president of the Catholic Church Extension Society, for another term of five years, according to word received from the Holy See. This is Bishop O'Brien's fourth term of five years.

* * * *

Archbishop Edward Mooney, of Detroit, chairman of the Administrative Board, National Catholic Welfare Conference, was host to the delegates at the first biennial convention of the National Council of Catholic Nurses, held in Detroit May 25-27.

* * * *

Mrs. J. W. McCollum, of Gainesville, Fla., president of the National Council of Catholic Women, presided at the sessions of the 21st national convention of that organization held at Hollywood, Fla., April 18-22. The Catholic woman's part in our war effort was among the important subjects discussed.

Mrs. Robert A. Angelo, of York, Pa., was elected president for the ensuing term.

* * * *

Most Rev. Thomas J. Toolen, Bishop of Mobile, Ala., was host to the delegates to the 32nd annual convention of the Catholic Press Association, meeting in Birmingham, Ala., May 27-30.

* * * *

Dr. Francis E. McMahon, professor of philosophy at the University of Notre Dame, was elected president of the Catholic Association for International Peace at the close of its 16th annual conference held at the Carroll Club in New York City.

* * * *

Most Rev. John T. McNicholas, O.P., Archbishop of Cincinnati and episcopal chairman of the Department of Education, National Catholic Welfare Conference, has extended invitations to 28 Catholic educational leaders to become members of an advisory committee to consult with the department concerning wartime problems that face the Catholic schools of the country.

* * * *

The 2nd American Congress for Aesthetics was held at The Catholic University of America April 24 and 25 under the auspices of the university, and

included addresses and discussions by prominent scholars of Europe and America. It was the second national convention of the American Society for Aesthetics, which was founded in 1939.

* * * *

The new liturgical altar in St. Patrick's Cathedral, which was installed to replace the high altar which had been in the Cathedral since 1879, was formally consecrated by Most Rev. Francis J. Spellman, Archbishop of New York on May 9. The former altar is installed in the Collegiate Church at Fordham University.

* * * *

Funeral services were held in the Culiacan Cathedral for Most Rev. Agustin Aguirre y Ramos, Bishop of Sinaloa, who died at the age of 75. He was named Bishop of Sinaloa in June, 1922.

* * * *

Most Rev. Francis J. Spellman, Archbishop of New York, presided at the Solemn Mass of Requiem in the Church of the Blessed Sacrament on March 4 for the late Dr. James J. Walsh, eminent Catholic physician, author and scholar, who died February 28, at the age of 76.

* * * *

90 years ago the First Plenary Council of Bishops of the United States was held at Baltimore, with Archbishop Francis P. Kenrick presiding as Apostolic Delegate.

* * * *

90 years ago, Rt. Rev. John Nepomucene Neumann, C.SS.R., was consecrated as Bishop of Philadelphia in St. Alphonsus' Church, Baltimore, by Archbishop Kenrick.

* * * *

40 years ago, Archbishop Michael A. Corrigan, of New York, died.

* * * *

A memorial Mass was celebrated in St. Patrick's Church, Charleston, S. C., to mark the 100th anniversary of the death of the first Bishop of Charleston, Rt. Rev. John England.

UNIVERSITY

The 53rd annual commencement of The University was held on May twenty-ninth. The order of the exercises and the list of graduates of The School of Canon Law were as follows:

Order of Exercises

Processional ..... The Catholic University Band
Mr. Paul Leman, Director
Presiding ..... The Chancellor of the University
Invocation ..... The Chancellor of the University
Announcements ..... The Vice Rector of the University
Oremus pro Pontifice Nostro Pio ..... The Catholic University Choir
Dr. Leo Behrendt, Director

Pope Pius Twelfth .....The Rector of the University
Recognition of the Deans of the Schools
of the University .....The Vice Rector of the University

Conferring of Degrees in Course:

The School of Social Science
The School of Nursing Education
The School of Social Work
The School of Engineering and Architecture
The Catholic Sisters College
The Summer Session
The College of Arts and Sciences
The Graduate School of Arts and Sciences
The School of Law
The School of Philosophy
The School of Canon Law
The School of Sacred Theology

Presentation of Candidates for Honorary
Degrees .....The Vice Rector of the University

Conferring of Degrees *Honoris Causa*:

Doctor of Laws (LL.D.)

Leo S. Rowe, Director General, The Pan American Union
General Wladyslaw Sikorski, Commander-in-Chief and Prime Minister of Poland
Right Reverend Joseph M. Gleason, Oakland, California
Reverend John P. McCaughan, Worcester, Massachusetts

Address .....The Honorable Leo T. Crowley
Alma Mater .....The Catholic University Choir
The Star-Spangled Banner .....The Catholic University Choir and Assembly
Benediction .....The Chancellor of the University
Recessional .....The Catholic University Band

THE SCHOOL OF CANON LAW

VERY REVEREND H. LOUIS MOTRY, S.T.D., J.C.D., Dean

BACHELOR IN CANON LAW (J.C.B.)

Rev. Coleman Francis Carroll .....Pittsburgh, Pa.
Rev. Joseph Edward Cieslukoski .....Grand Rapids, Mich.
Rev. Vincent Paul Coburn .....Newark, N. J.
Rev. Edward Thomas Cope, S.S. .....Washington, D. C.
Rev. Patrick James Coyle, O.F.M. .....Washington, D. C.
Rev. Paul Raymond Coyle .....Pittsburgh, Pa.
Rev. Joseph John Dunleavy .....Marquette, Mich.
Rev. Bartholomew Francis Fair .....Philadelphia, Pa.
Rev. Thomas Raphael Gallagher, O.P. .....Washington, D. C.

Rev. John Mark Gannon ..... Erie, Pa.
Rev. J. William Goldsmith ..... Charleston, S. C.
Rev. Joseph Gerard Goodwine ..... New York, N. Y.
†Rev. John Joseph Heneghan ..... Brooklyn, N. Y.
Rev. Robert Owens Hickman ..... Richmond, Va.
Rev. Romuald Eugene Kowalski, O.F.M. ..... Washington, D. C.
Rev. David William McCarthy ..... Paterson, N. J.
Rev. Alan James McCoy, O.F.M. ..... Washington, D. C.
Rev. Vincent John McDevitt ..... Philadelphia, Pa.
Rev. William John McKune ..... Louisville, Ky.
Rev. Thomas Owen Martin ..... Grand Rapids, Mich.
Rev. Paul John Miklosovic ..... Philadelphia, Pa.
Rev. Michael John Mleko ..... Lansing, Mich.
Rev. Thomas Maurice Mundy ..... Philadelphia, Pa.
Rev. John Coyle O'Dea ..... San Francisco, Calif.
Rev. Pierre Marie Poisson, C.S.C. ..... Washington, D. C.
Rev. Richard James Schumacher ..... Kansas City, Mo.
Rev. Casimir Joseph Stadalnikas, M.I.C. ..... Washington, D. C.
Rev. Vincent Matthew Stokes ..... Raleigh, N. C.
Rev. Bernard C. Stolte ..... St. Louis, Mo.
Rev. Eugene Henry Sullivan ..... Philadelphia, Pa.
Rev. William Edward Vaughan ..... Salt Lake City, Utah
Rev. Edward Vincent Wade ..... Los Angeles, Calif.
Rev. Urban Stanley Wagner, O.M.C. ..... Washington, D. C.

LICENTIATE IN CANON LAW (J.C.L.)

Rev. Matthew Aloysius Benko, O.S.B., J.C.B. ..... Latrobe, Pa.
†Rev. Thomas G. Brockhaus, O.S.B., J.C.B. ..... Mt. Angel, Oreg.
Rev. Joseph J. Christ, J.C.B. ..... Chicago, Ill.
Rev. Patrick M. Clancy, O.P., J.C.B. ..... Washington, D. C.
Rev. Thomas J. Clarke, J.C.B. ..... Indianapolis, Ind.
Rev. John Patrick Connolly, J.C.B. ..... San Francisco, Calif.
Rev. John J. Downey, J.C.B. ..... Boston, Mass.
Rev. William M. Drumm, J.C.B. ..... St. Louis, Mo.
Rev. Bernard J. Flanagan, J.C.B. ..... Burlington, Vt.
Rev. Charles F. Keating, J.C.B. ..... Lansing, Mich.
Rev. Stephen J. Kelleher, J.C.B. ..... New York, N. Y.
Rev. Leonard J. Kostka, C.PP.S., J.C.B. ..... Carthagena, Ohio
Rev. Joseph P. Larkin, J.C.B. ..... Philadelphia, Pa.
Rev. Paul F. Leibold, J.C.B. ..... Cincinnati, Ohio
Rev. Gordian Lewis, C.P., J.C.B. ..... Louisville, Ky.
Rev. Charles G. Maloney, J.C.B. ..... Louisville, Ky.
Rev. Adolph Marx, J.C.B. ..... Corpus Christi, Tex.
Rev. Raymond A. Matulenas, O.S.B., J.C.B. ..... Peru, Ill.
Rev. Damasus A. Mozeris, J.C.B. ..... Chicago, Ill.
Rev. Charles G. O'Leary, C.SS.R., J.C.B. ..... Washington, D. C.
Rev. Charles J. Plauché, J.C.B. ..... New Orleans, La.
Rev. Cornelius M. Power, J.C.B. ..... Seattle, Wash.

Rev. Ralph Vincent Shuhler, O.S.A., J.C.B. ..... Washington, D. C.
Rev. Thaddeus S. Ziolkowski, J.C.B. ..... St. Cloud, Minn.

DOCTOR IN CANON LAW (J.C.D.)

Rev. Garrett Francis Barry, O.M.I., J.C.L. ..... Washington, D. C.
Dissertation: *"Violation of the Cloister."*

Rev. Gatien Bolduc, C.S.V., J.C.L. ..... Joliette, Quebec, Can.
Dissertation: *"Les études dans les religions cléricales."*

Rev. David John Boyle, J.C.L. ..... Fargo, N. D.
Dissertation: *"The Juridic Effects of Moral Certitude on Prenuptial Guarantees."*

Rev. Walter Joseph Canavan, J.C.L. ..... Denver, Colo.
Dissertation: *"Profession of Faith."*

Rev. Joseph J. Comyns, C.SS.R., J.C.L. ..... Esopus, N. Y.
Dissertation: *"The Papal and Episcopal Administration of Church Property."*

Rev. Bruno Desrochers, J.C.L. ..... Quebec, Canada
Dissertation: *"Le Premier Concile Plénier de Québec et le Code de Droit Canonique."*

Rev. Robert Edward Dillon, J.C.L. ..... Syracuse, N. Y.
Dissertation: *"Common Law Marriage."*

Rev. Edward John Dodwell, J.C.L. ..... Atlanta-Savannah, Ga.
Dissertation: *"The Time and Place for the Celebration of Marriage."*

Rev. Thomas Andrew Donnellan, J.C.L. ..... New York, N. Y.
Dissertation: *"The Obligation of the Missa pro Populo."*

Rev. Louis Anthony Eltz, J.C.L. ..... Philadelphia, Pa.
Dissertation: *"Cooperation in Crime."*

Rev. Sylvester Francis Gass, J.C.L. ..... Milwaukee, Wis.
Dissertation: *"Ecclesiastical Pensions."*

Rev. John Joseph Guiniven, C.SS.R., J.C.L. ..... Washington, D. C.
Dissertation: *"The Precept of Hearing Mass on Sundays and Holy Days of Obligation."*

Rev. John T. Gulczynski, J.C.L. ..... Dallas, Texas
Dissertation: *"The Desecration and Violation of Churches."*

Rev. John Leo Hammill, J.C.L. ..... Ogdensburg, N. Y.
Dissertation: *"The Obligations of the Traveler According to Canon 14."*

Rev. John Joseph Haydt, J.C.L. ..... Philadelphia, Pa.
Dissertation: *"Reserved Benefices."*

Rev. Roger John Huser, O.F.M., J.C.L. ..... Cincinnati, Ohio
Dissertation: *"The Crime of Abortion in Canon Law."*

Rev. Francis Patrick Kearney, J.C.L. ..... Baltimore, Md.
Dissertation: *"The Principles of Canon 1127."*

Rev. Michael James Keene, O.S.B., J.C.L. ..... St. Meinrad, Ind.
Dissertation: *"Religious Ordinaries and Canon 198."*

†Rev. John Joseph Król, J.C.L. .....Cleveland, Ohio
Dissertation: *"The Defendant in Contentious Trials."*

Rev. Leo James Linahen, J.C.L. .....Portland, Oreg.
Dissertation: *"De Absolutione Complicis in Peccato Turpi."*

Rev. Joseph Aloysius McCloskey, J.C.L. .....Philadelphia, Pa.
Dissertation: *"The Subject of Ecclesiastical Law According to Canon 12."*

Rev. Francis Joseph O'Neill, C.SS.R., J.C.L. .....Washington, D. C.
Dissertation: *"The Dismissal of Religious in Temporary Vows."*

Rev. John Edward Prince, J.C.L. .....Spokane, Wash.
Dissertation: *"The Diocesan Chancellor."*

Rev. Albert Joseph Riesner, C.SS.R., J.C.L. .....Washington, D. C.
Dissertation: *"Apostates and Fugitives from Religious Institutes."*

Rev. Joseph Bernard Stenger, J.C.L. .....Belleville, Ill.
Dissertation: *"The Mortgaging of Church Property."*

Rev. Joseph Francis Waldron, J.C.L. .....Philadelphia, Pa.
Dissertation: *"The Minister of Baptism."*

Rev. Robert Albert Willett, J.C.L. .....Louisville, Ky.
Dissertation: *"The Probative Value of Documents in Ecclesiastical Trials."*

Rev. Edward Martin Woeber, J.C.L. .....Denver, Colo.
Dissertation: *"The Interpellations."*

† Work completed February, 1942.

* * * *

A Pontifical Mass of Requiem was celebrated at 10 a. m. June 12th for Bishop Joseph M. Corrigan, late rector of the University, by the Most Rev. Michael J. Curley, Archbishop of the Baltimore and Washington Archdiocese, in the presence of His Excellency, the Most Rev. Apostolic Delegate.

The body of the rector was brought to Caldwell Hall on the University campus on June 10th and lay in state there until 4 p. m. June 11th when it was removed to the Shrine of the Immaculate Conception. There at 8 p. m. the office of the dead was chanted.

Officers of the Mass were the Rt. Rev. Msgr. Francesco Lardone, assistant priest; the Rev. Dr. John J. Rolbiecki, deacon, and the Rev. Dr. B. H. Skahill, subdeacon.

Deacons to His Eminence, Dennis Cardinal Dougherty, Archbishop of Philadelphia, were the Rt. Rev. Msgr. Peter Guilday and the Rt. Rev. Msgr. Francis J. Haas. Deacons to His Excellency, the Most Rev. Apostolic Delegate, were the Rt. Rev. Msgr. G. Barry O'Toole and Rt. Rev. Msgr. Edward B. Jordan.

Honorary pallbearers at the funeral were Andrew Maloney, of New York; William Galvin, of Baltimore, and John Saul, Rt. Rev. Msgrs. Guilday and O'Toole, and Rev. Dr. Louis Motry.

The active pallbearers, chosen from the faculty of the University, were the following: Dr. A. E. Landry, Dr. Frederick B. Murphy, Dr. Martin M. P. McGuire, Dr. Roy J. Deferrari, Dr. Robert Connery and Anthony J. Scullen.

The burial in Philadelphia Saturday was preceded by a Pontifical Mass of Requiem in the Philadelphia Cathedral at 10 a.m. The officiating preacher was the Most Rev. Hugh Lamb, Auxiliary Bishop of the Philadelphia Archdiocese.

The rector died on the night of June 9th at Georgetown Hospital, where he was taken suffering from pneumonia. He had served as rector since 1936, when he was appointed for a five-year term by Pope Pius XI. He was reappointed for another five-year term only last year.

He was a personal friend of Pope Pius XII and was serving his first year as rector of the university when the present Pope, then the papal secretary of state, Eugenio Cardinal Pacelli, visited the institution.

His last public sermon was on May 14 in commemoration of the jubilee of Pope Pius XII at the national shrine of the Immaculate Conception at the University.

* * * *

Leaves of absence during the duration of the emergency have been granted to ten members of the faculty of the University in order that they might fill war posts.

In the Chaplain Corps of the U. S. Navy the University is now represented by Rev. Maurice S. Sheehy, Rev. Robert J. White, and Rev. Gerald F. Dillon.

Lay members of the faculty who are engaged in special war work include Dr. Eugenia K. Spalding, who is consultant in nursing education with the U. S. Public Health Service; Dr. Allan H. Fry and Dr. John Lackey Brown, who are assigned to the Office of Co-ordinator of Information; Dr. Walter J. Moore, now engaged in special governmental research at Princeton University; T. R. Robinson, who is doing experimental work on an automatic gun design in a war plant, and Dr. Joseph E. O'Brien and Dr. Arthur J. Harriman, who are assigned to special tasks in Washington with the Rural Electrification Administration and the Office of Emergency Management, respectively.

* * * *

Most Rev. John F. O'Hara, C.S.C., Military Delegate, and John Saul, prominent Catholic layman of Washington, have been named members of the Board of Trustees of the University.

* * * *

The erection on the University campus of an alumni building, designed for general recreational purposes of all students as well as providing space for the national office of the graduate body, is outlined in a special letter just forwarded to the 9,000 alumni by the national president of the alumni, Andrew P. Maloney.

DIGNITIES

Rt. Rev. Msgr. Augustine Danglmayr, vicar general of the Diocese of Dallas, has been named by His Holiness Pope Pius XII to be Titular Bishop of Olba and Auxiliary Bishop of Dallas.

* * * *

Most Rev. Charles F. Buddy, Bishop of San Diego and Most Rev. Walter J. Fitzgerald, S.J., Coadjutor Vicar Apostolic of Alaska, have accepted ap-

pointments as Vicar Delegates to aid the Military Ordinariate in supervising the work of Catholic chaplains in the United States Armed Forces.

* * * *

Very Rev. Joseph Frings, rector of the major seminary in Cologne, has been appointed Archbishop of Cologne, succeeding His Eminence Joseph Cardinal Schulte, who died on March 11, 1941.

* * * *

Msgr. John F. Dalton, president since 1936 of Maynooth College, Ireland, has been appointed Coadjutor Bishop of the Diocese of Meath, Ireland, with the right of succession, and Titular Bishop of Binda.

* * * *

Most Rev. John F. O'Hara, Military Delegate, former president of the University of Notre Dame, has been appointed a member of the national advisory board of directors of United China Relief.

* * * *

Rev. Alfred J. Gummer, of Oberon in the Diocese of Bathurst, Australia, has been appointed Bishop of Geraldton, Australia.

* * * *

Rev. John Tharsicius Senner, O.F.M., has been appointed Vicar Apostolic of Chiquitos, Bolivia.

* * * *

Rev. John Gunnarson, of the Montfortan Congregation, has been appointed Vicar Apostolic of Iceland.

* * * *

Very Rev. Msgr. Egidio Vagnozzi, counselor of the Apostolic Delegation in Washington, has been named counselor of the Papal Nunciature at Lisbon, Portugal. Aged 36, he is the youngest counselor in the foreign service of the Holy See. Lisbon is a first-class Nunciature.

* * * *

Rt. Rev. Msgr. Thomas J. McDonnell, of New York, national director of the Pontifical Society for the Propagation of the Faith, has been appointed general secretary of the Supreme Council of the Society.

* * * *

Rev. Walter S. Carroll, Pittsburgh priest attached to the Papal Secretariat of State, has been appointed to the Supreme Council of the Missionary Union of the Clergy, representing the English-speaking peoples.

* * * *

Rev. Paul F. Tanner, of Milwaukee, has been named director of the Youth Department of the National Catholic Welfare Conference. He succeeds Rev. Vincent Mooney, C.S.C., who becomes field consultant with the National Catholic Community Service, one of the United Service Organizations.

* * * *

Rev. Donald M. Cleary, of Ithaca, N. Y., has been appointed national chaplain of the Newman Club Federation for the coming year.

Rev. Leo M. Finn, supreme chaplain of the Knights of Columbus, has been named a Domestic Prelate by His Holiness Pope Pius XII.

* * * *

At the motherhouse of the Sisters of the Blessed Sacrament for Indians and Colored People, Cornwells Heights, Pa., President Elie Lescot, of Haiti, presented a citation and medal to Mother M. Katharine Drexel, foundress, conferring upon her the rank of Commander of the National Haitian Order of Honor and Merit. The award was for her work for the Colored people.

* * * *

Helen Constance White, teacher and author, of the University of Wisconsin, was chosen as the 60th Laetare Medalist of the University of Notre Dame, the thirteenth woman to receive the medal, which was first awarded to John Gilmary Shea, historian, in 1883.

* * * *

Rev. Joseph B. Collins, S.S., professor of catechetics at The Catholic University of America, has been named director of the National Center of the Confraternity of Christian Doctrine.

* * * *

Twenty-two women prominent in charitable work in the Archdiocese of New York have received the Papal medal, "Pro Ecclesia et Pontifice", from His Holiness Pope Pius XII. Included in the list are:

Mrs. Paul T. Kammerer, Jr., Mrs. Douglas Gibbons, Lady Margare Armstrong, Mrs. Bruno Benziger, Mrs. George Blumenthal, Mrs. Gerald Gorden, Mrs. George Bradford, Mrs. George H. Colkett; Mary Delaney, Mary Dooling, Jessica Dragonette; Mrs. Margaret B. Farrell, Mrs. Maren Fellowes, Mrs. Jose Ferrer, Mrs. Basil Harris, Mrs. Robert Hoguet, Mrs. Frank P. Kennedy; Mrs. James Looram, Mrs. James McDonnell, Mrs. Patrick McGovern, Mrs. Alfred E. Smith and Elizabeth Sullivan.

* * * *

Dr. E. S. Murphy, of Missoula, Mont., has been awarded the 1942 DeSmet Medal, by Gonzaga University, Spokane. The award is given annually to a Catholic layman who has advanced the cause of Catholicity in the northwest.

* * * *

Dr. Joseph A. Becker, of Mountain Lake, N. J., reesarch physicist of the Bell Telephone Laboratories, has been awarded the 14th annual Mendel Medal of Villanova College, for outstanding achievement in science. The medal was presented at the College on May 3.

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

I. (a) Date: March 11, 1942.

(b) Title: "A Summary of the Suggested Causes of the Fall of the Roman Civilization"

(c) Author: Col. Joseph M. Cormack, A.B. (Northwestern University), LL.B., J.S.D. (Yale University); formerly Professor of Law at Emory and Ohio State Universities; since 1929 Pro-

fessor of Roman and Comparative Law at the University of Southern California; at present on active duty as a reserve Lt. Col. in the Judge Advocate General's Department.

(d) Abstract: Discussed the causes alleged for the fall both within and outside the Empire: war; peace; the Great Pestilence of 166 A. D.; racial deterioration; slavery; the concentration of wealth; malaria; and climactic change. Special emphasis was laid in discussing Christianity from this point of view.

II. (a) Date: April 29, 1942.

(b) Title: "St. Chrysostom and the Quota of the Soul in the Law of Inheritance."

(c) Author: Dr. Eberhard F. Bruck, formerly Professor of Roman and Civil Law at the Universities of Geneva, Breslau, Frankfurt, and Bonn; Dean of Law at the Universities of Breslau and Frankfurt; at present research associate of law at Harvard University and lecturer in Roman Law in the History Department of the latter institution.

(d) Abstract: Traced the enigmatic and much disputed origin of the quota to the sermons of St. Chrysostom through numerous laws of the East and the West having notable impact on fundamental changes in civilizations and laying the foundations for social law.

III. (a) Date: May 11, 1942.

(b) Title: "The *Jus Gentium*: a New Point of View."

(c) Author: Max Radin, Ph.D., LL.B., Professor of Roman Law at the University of California, Magister of the Riccobono Seminar of Roman Law in America; discussion by Walter L. Moll, S.J.D., George Washington University Law School.

(d) Abstract: Contrasted the notions of *ius naturale* and *ius gentium*, showing the important position which the foreigner occupies in the historical development of the *ius gentium*, comparing in this regard the Greek City States with City of Rome.

(e) Guests: At this meeting Prizes in Trust Law Competition were awarded to students of the Law School by William O. Douglas, A.B., LL.D., Associate Justice, Supreme Court of the United States. Preceding the award, an address was made by James M. Mead, LL.D., Senator from New York, on the subject, "The Legislative Process in War Time", with a discussion of his topic by James A. Shanley, A.B., LL.B., Congressman from Connecticut.

Supplement—THE JURIST

VOLUME 2 JULY, 1942 No. 3

CANONICAL EPISCOPAL VISITATION OF RELIGIOUS COMMUNITIES

(*Excluding Moniales*)

(Prepared by Joseph B. Stenger, J.C.D., as seminar project under Jerome D. Hannan, J.C.D.)

In the following questionnaire an attempt is made to present a comprehensive outline of the matters in which the local Ordinary is obliged to exercise vigilance in regard to religious communities existing in his Diocese. It may be that in some respects it will appear to include a too detailed list of questions while overlooking other questions of greater weight. Even if this be the case, it is hoped that it may afford a groundwork which more capable workmen may trim or amplify in the interests of perfection.

The primary purpose of the Canonical Visitation of Religious Communities is to inquire into affairs in general and the observance of laws which bind places and persons. But it can serve also as a means of imparting information to those visited. Since the Visitation is a sound and effective means of suppressing abuses and maintaining the ideals of the religious life, the smaller houses can be visited to good effect, for it is in the smaller houses that the religious is not surrounded by the companionship and by the atmosphere which makes the pursuing of the higher life easier.

In arranging the following formula an attempt was made to form one document for the Chancery Office which could be used to visit all types of Religious Communities. The Visitation of a Parochial Church of religious was not given much attention because it would be subject to the Bishop's Visitation of the Parishes. The Visitation of Moniales was excluded because the different types of Moniales would require distinct sets of questions and this might lead to confusion. With only a very few variations, this formula can be adapted to the Visitation of Moniales.

Section I is the most general of the three sections in its application, extending to all communities; Section II is applicable to all communities, except Clerical Exempt; and Section III, only to communities of Diocesan Approval. Note as to Section I that the Bishop is not *bound* to visit any Communities as to the matters covered by the questions. He may rely on customary procedure to keep himself informed of these matters, unless in his

discretion a Visitation seems to be his duty in special circumstances. The Quinquennial Visitation is of obligation only as to matters covered by Canon 512, §§ 1-3. The latter includes the Visitation of the Church, the Public Oratory, the Sacristy, and the Confessionals in Clerical *Congregations,* even though Exempt. The formal Visitation is discretionary also as to questions listed under N-R (inclusive) and V in Section II.

To use this formula it is suggested that the Visitor first acquaint himself with the type of Community to be visited and then on a separate slip note down the sections which are applicable. E. g., to visit a Community of Brothers of Pontifical Right teaching at a Parochial High School the Visitor would ask only the questions under the letters A, C, F, G, H, I, N, Q, R, S, V. If they have a chapel of their own K, L, M would be added. Questions inapplicable to any particular Diocese may be omitted, but questions should not be transferred from one section or part to another.

Section I

(To be asked of all Communities, Exempt or Non-Exempt, of Pontifical or Diocesan Approval)

part 1

(For Men and Women)

1. Name of Community:
2. Name of Institute and/or Parish to which attached:
3. Address:

(The following six questions are pertinent in the Visitation of even Clerical Exempt Communities because knowledge to which the local Ordinary is entitled should come not only from the Superior but also from subordinate members of the Community.)

4. Name of Individual (in full):
5. Age: Years since profession:
6. In Temporary or Perpetual Vows:

A. *Personal*

1. How many members in the Community?
2. Has any member of the Community been transferred since the Visitation was announced? (C. 513, § 1 & C. 2413, §§1, 2).
3. Has the Superior or any other member of the Community attempted to dissuade you from answering any question or disclosing some fact? (*Loc. cit.*)

B. *The Church, the Public Oratory, the Sacristy, Confessionals.* (Cc. 512, § 2, 2°, 1261, § 2).

(The Visitation of the Church and Public Oratory of these groups in matters for which there exists distinct diocesan legislation can be fashioned after the Canonical Visitation of the Diocese. Semi-Public Oratories of Clerical Religious are excluded from Episcopal Visitation; Visitation of the Semi-Public Oratory, the Sacristy, Confessionals and the conduct of divine worship is

presented in Section II and the questions there should be answered for the Churches, the Public Oratory, the Sacristy, the Confessionals, and the conduct of divine worship in Clerical *Congregations* but not in Clerical Orders. When the Church or Oratory is exempt, the adjoining Sacristy and Confessionals are also exempt).

(The following reply of The Pontifical Commission is pertinent here. The Commission of Interpretation was asked:

I. Whether the Ordinary of the place can make a visitation every five years of the churches of the Society of Jesus which are in his diocese; and if not:

II. Whether, in a case where diocesan (i. e., synodal) laws do not contain new matter as contemplated in canon 1261, but merely urge existing ecclesiastical laws, the Ordinary can make a visitation; and if not:

III. Whether the visitation mentioned in canon 1261, § 2, is to be made in the same manner as the usual quinquennial visitation of non-exempt churches; and if not:

IV. Whether the replies given before the new Code by the Sacred Congregation of Bishops and Regulars can be extended to the visitation mentioned in canon 1261, § 2; namely, that, generally speaking, the Ordinary may use his right of visitation only in as far as he has positive information that the particular laws enacted by him are not being observed in the churches of exempt *Regulars.* [Italics inserted—Cf. C. 512, § 2, 2°].

Reply. The Eminent President of the Commission replied as follows: To I, II, and III, in the negative; to IV, in the affirmative.

Rome April 8, 1924. Replies by President, Cardinal Gasparri
[private]

Cf. Bouscaren, *The Canon Law Digest,* at Canon 1261.)

C. *Schools* (Canons 1381, 1382)

1. (Non-Diocesan school system schools for extern pupils).
   a) Are the text books used in the teaching of religion approved by the Bishop?
   b) Are the methods used liable to impart distorted notions concerning the attributes of God, the Blessed Virgin, or any article of faith or morals?
   c) Have the teachers of religion been approved by the Bishop?
2. (Diocesan School System schools).
   a) Is the entire Diocesan Course of Studies used in all the subjects, together with the textbooks and methods prescribed therein?
   b) Is the School calendar observed?
   c) Are the instructions of the Superintendent of Schools followed regarding examinations?
3. (Schools attended by Aspirants or Postulants).
   a) Is there anything dangerous to faith or morals occurring therein?

D. *Non-Collegiate Ecclesiastical Institutes in General, Incorporated and Non-Incorporated.* (Hospitals, Orphanages, etc.) (C. 1491, § 2)

1. Is each lay employee free to perform his (or her) religious and family duties?

2. State sex, age, salary, and hours of work of each class of employee.
3. Is there any opportunity for immoral conduct among the employees or the inmates?
4. Is sufficient opportunity given the resident employees and the inmates for the reception of the Sacraments frequently?
5. Is catechetical instruction given the resident employees and the inmates? How frequently?
6. Is adequate provision made that the Sunday precept can be met by the resident employees and the inmates?
7. Are the seasons and days of fast and abstinence properly observed?
8. What supervision is exercised over the reading of the resident employees and the inmates?

E. *Canonically Incorporated Non-Collegiate Ecclesiastical Institutes* (Canon 1491, § 1)

1. Name of Institute.
2. Has it been created an ecclesiastical institute by the Bishop's decree? (C. 1489, § 1).
3. Is a copy of the secular charter at the Chancery Office? (C. 1490).
4. How many buildings comprise the Institute?
5. What is the value of each? Lots? Total?
6. When appraised? By whom?
7. Average annual income for last five years?
8. Total indebtedness?
9. Average payment on principal for past five years?
10. How much is secured by mortgages? When due?
11. How much is secured by other notes? When due?
12. What is the rate of interest on the mortgages? On the notes?
13. If there is any delinquent interest, state total amount?
14. Have the provisions of Canon Law been observed regarding alienation, donations, mortgages, debts, sales, exchange, leases, and rents? (Canons 1529 to 1543).
15. Who is your legal advisor for the Civil Law regarding the entering of contracts?
16. Have any foundations been willed or donated to the Institute? (E. g., beds in a hospital, burses for students, etc.)
    Are the intentions of the donors being carried out? (C. 1493).

F. *Gifts for Parish or Mission* (Canons 533, § 1, 4°; 533, § 2; 535, § 3, 2°).

1. Have any religious received gifts for the benefit of any parish or mission? Amount? Nature?
2. Has there been any change in the nature, investment of it, or change in the investment, without the consent of the Bishop?

G. *Trust Funds* (C. 1516)

1. Has the Community or any member thereof been the recipient of any gift or trust fund to be spent for some particular work in the Diocese?

2. Was notice of acceptance thereof sent to the Chancery Office? Was inventory and list of obligations sent?
3. Was the Bishop's permission obtained for the investment or change of investment? (C. 533, § 1, 3°). (This question is omitted in the case of Clerical Exempt Regulars).
4. If the trust has been carried out, has notice of compliance been sent to the Chancery Office?
5. If trust is still being carried out, what is the nature of its assets? Total? Its purpose?

H. *Seminary Tax* (All religious houses and institutes are subject)

1. Has the Seminary tax been paid according to the laws of the Diocese? (C. 1356).

I. *Conversion of Institute or House*

1. Has any school or charitable institute been opened which is entirely separated from any previously erected house? (C. 497, § 3).
2. Has any previously erected house been changed to, or is it being used for, a purpose other than which it was founded? (C. 497, § 4).

Section I

part 2

(For Clerical Communities Only)

J. *The Sacred Ministry*

1. Are the Diocesan Statutes observed regarding Mass stipends (manual)? (C. 831, § 3).
2. Have you heard the confessions of either the laity or religious without receiving faculties from the Bishop? (C. 874).
3. Have you heard the confessions of either professed women or their novices without special delegation from the Bishop? (C. 876). (Exceptions: serious illness, or in a Church or Oratory—Cc. 522, 523).
4. Has the Program of Instructions for the Diocese been followed in your sermons in the Churches of the Diocese where you assist at the regular services? (C. 1345). In your own Church when the laity attend? (Canons 1336 and 1345).
5. Have you the faculties of the Diocese? If so, are theological conferences held in the local house? If not, do you attend the Diocesan conferences? (C. 131, § 3).

Section II

(To be asked of all Non-Exempt Congregations, whether of Pontifical or Diocesan Approval. The same questions mutatis mutandis to be asked of Exempt, as well as Non-exempt Clerical Congregations as to the Church, the Public Oratory, the Sacristy, the Confessionals, and the conduct of divine worship).

(For Men and Women)

K. *The Chapel* (Semi-Public Oratories of lay groups are subject to Visitation. C. 512, § 2, 2°, 3°; C. 1192, §§1, 2).

1. What is the title of the chapel?
2. Is it blessed? (C. 1196).
3. Is it a part of the convent, or institute, or a separate building?
4. If a separate building, what is the condition of its exterior—roof, walls, drain pipes, doors?
5. What is the condition of the interior—arches, pillars, windows, doors, walls, flooring, floor-coverings, seats, kneelers?
6. Are any repairs urgently needed?
   Estimated cost of these repairs?
7. Is it satisfactorily heated and ventilated?
8. How often is it cleaned?
9. If a separate building, is there a cross above the steeple or facade?
   Any bells? If bells, when and by whom blessed?
10. Can all doors leading to the outside be securely locked?
11. How many exits are there? Do the doors open outward?
12. If a separate building, has it a basement? If so, what is it used for?
13. If not a separate building, what are the rooms below the chapel used for? The rooms above?
14. Are there Holy Water fonts at the door of the Chapel? What type? Are the fonts and the Holy Water kept clean and sanitary?
15. Is there a gallery for the choir?
16. Is the organ in good condition? What is its make?
17. Is there a document certifying to the canonical erection of the Stations of the Cross?
18. Exhibit document showing by whom erected?
19. Of what material is the sanctuary floor?
20. If carpeted, is the carpet in good condition?
21. How many altars are there in the chapel?
22. Are the altars portable or fixed?
23. Of what material are the altars?
24. Is an altar stone of proper size provided?
25. Are the sepulchres in the altar stones in good condition and sealed with cement?
26. Are the altar stones cracked?
27. How many steps leading to the altar?
28. Are there three linen cloths on the altar, or at least two with one folded double?
29. Are the linens blessed?
30. How often are the linens changed?
31. Does the top cloth reach the ground on both sides?
32. Are there six large candlesticks on the main altar?

33. Is there a crucifix between the candlesticks, and is it sufficiently large to be seen by those attending?
34. Is there a book or card for the prayers after Mass?
35. Are wax candles used in the minimum number prescribed for all functions? What is the percentage of wax?
36. How many candles are used at High Mass? At Low Mass? At Benediction? At Forty Hours (or Thirteen Hours)?
37. In what condition are the altar cards?
38. Are the Diocesan statutes observed regarding lights on or near the altars, and regarding statues upholding electric candelabra?
39. Is an ablution cup with clean purificator provided?
40. Are coverings provided for the altars, for use during the time when the sacred functions are not held?
41. If the front of the altar is not ornamental, is an antipendium used?
42. Are there any closets under the altar?
43. Under what title is the main altar dedicated?
44. Are there four large candlesticks on the side altars?
45. Is there a credence table covered with a white cloth?
46. Is there a bench (*scamnum*) for the ministers on the Epistle side of the sanctuary?
47. Of what material is the sanctuary rail?
48. Is a small bell (*"parva campanula"* or *tintinnabulum"*) provided for use at sacred functions?
49. What statues are there in the chapel?
50. What pictures are there in the chapel?
51. Is there only one statue or picture of each saint or mystery?
52. Has the location of the chapel been changed from one part of the building to another, or to another building? (C. 1192, § 3).
53. Of what material is the tabernacle? (C. 1269 and Instr. of S. C. Sac. of May 26, 1938—*A.A.S.*, XXX [1938], 198).
54. Is the tabernacle in the form of a safe?
55. Is the tabernacle at all times securely closed and locked?
56. Is the key of the tabernacle of silver or gold plated metal?
57. Is the key kept by a priest and carefully put away?
58. Is a safe place under lock and key provided to hold the tabernacle key when not in use?
59. Is there a veil at least in front of the tabernacle? What colors are used?
60. Is sufficient provision made to safeguard the tabernacle day and night? Is there a burglar alarm system used?
61. Is the tabernacle lined with white silk, or with gold or silver plate? If not, is it gilded?
62. Are the cups of the chalices silver or gold?
63. Are the interiors of the chalices, ciboria, and lunette gold plated, and are they blessed?
64. Is there a corporal inside the tabernacle?
65. Is there a white veil for covering the ciboria?
66. Is there a special case for the lunette?

67. Are the altar breads well made and fresh? (C. 815, § 1).
68. How often is the Benediction Host renewed? (C. 1272).
69. Is Mass said at least once a week in the chapel? (C. 1265, § 1, 1°).
70. Is the chapel provided with an ostensorium?
71. Does a veil cover the ostensorium when it stands on the altar before and after Exposition of the Blessed Sacrament?
72. Is a Communion cloth, as well as a paten without engraved ornament, provided for use in the distribution of Communion? (S. C. de Sac., Instr. of March 26, 1929—*A.A.S.*, XXI [1929], 631).
73. Have you any serious complaint regarding the kind of Divine Services and the time at which they are conducted in your chapel?
74. Who is your chaplain? (To be asked only in the case of lay communities). By whom was he designated to act as such? (C. 529).
75. (To be asked at Institutions only): a) Is there more than one chapel? (C. 1194, § 4). b) In how many chapels is the Blessed Sacrament reserved? (Canons 1265, § 2; 1267).

L. *The Sacristy*

1. Can the sacristy be securely locked?
2. Is there a sufficient number of cabinets for the vestments?
3. Is there a lavabo for the exclusive use of the priests?
4. Is there a sacrarium?
5. Is there a titular and collect card?
6. Is there a priedieu with a card for the Preparation and Thanksgiving prayers?
7. Is there a card with the prayers for vesting?
8. Is there an Ordo in the Sacristy?
9. Is there a case or table conveniently arranged for vesting?
10. Is there a crucifix over the case?
11. How many altar cloths? Palls? Purificators? Corporals? Are they linen?
12. How and by whom are the corporals, palls, and purificators washed?
13. How many finger towels?
14. How many missals and what is the date of publication of each? Have later feasts been added?
15. How many missals for Requiem Masses and what is the date of publication of each?
16. Is there an Epistle and Gospel book according to the latest revision of the New Testament?
17. Is there a complete edition of the "*Rituale Romanum*"? Date of publication?
18. How many missal stands?
19. How many chalices? Patens? What is their condition?
20. How many ciboria? What is their condition?
21. How many cruets and plates? (Must be of glass but can have metal ornamentation).
22. Are there containers for large and small altar breads?
23. Is there a Holy Water vessel and as Aspersorium?

24. Is there a processional cross?
25. Is there a processional canopy?
26. How many thuribles and boats?
27. Is there a set of funeral candlesticks?
28. Is there a catafalque and pall?
29. Is there a paschal candlestick?
30. Is there a staff and stand for the triple candle?
31. How many torches?
32. Is there a clapper for use during Holy Week?
33. Are there purple covers for the crucifix and statues during Holy Week?
34. How many albs? Amices? Cinctures? What is their condition?
35. How many sets of vestments for Low Mass? White? Red? Green? Purple? Cloth of Gold? Black? Rose?
36. How many complete sets of vestments for Solemn Mass? White? Red? Green? Purple? Cloth of Gold? Black? Rose?
37. How many copes? White? Red? Green? Purple? Cloth of Gold? Black?
38. How many humeral veils for Benediction?
39. How many burses for Benediction?
40. How many surplices for priests?
41. How many cassocks for altar boys? What type?
42. What are the colors of the altar boys cassocks?
43. How many veils for the ciboria?
44. In what condition are the vestments?
45. Is there a veil on a standard to be placed before the exposed Blessed Sacrament while a sermon is being preached?
46. Is there a cup with a cover for receiving the purification in the case of bination?
47. How many vases for flowers for decorating the altar?
48. Are artificial flowers used on the altar?
49. Where are the altar breads procured?
50. From whom is the altar wine procured?
51. Exhibit the book of inventory of the above articles.

M. *Confessionals*

1. How many confessionals are there?
2. Are they in a conspicuous place? (C. 909, § 1).
3. Are they provided with gratings and sliding doors? (C. 909, § 2).
4. Is there a crucifix or devout image on the penitent's side?
5. Are there any practical arrangements for the hearing of the deaf?
6. Is there a confessional with a grating in the sacristy? In the parlor?

N. *Divine Worship*

1. Have the Diocesan Statutes been observed regarding the ringing of bells? Prayers for peace? *Oratio imperata?* (C. 612).

2. Have any Litanies not approved by the Holy See been recited by the Community in the Church or Oratory? Or in choir? (D. A. 3820, 3916).
3. Has the Bishop's permission been obtained to reserve the Blessed Sacrament in the main oratory? (C. 1265, § 1, 2°). (To be omitted in Clerical Communities).
4. In how many Chapels or Oratories is the Blessed Sacrament reserved? (C. 1267).
5. Is public Exposition of the Blessed Sacrament (*cum ostensorio*) ever held on days other than those permitted by Synodal statutes? (C. 1274).
6. Is the Blessed Sacrament ever removed at night to a safer place? Has the permission of the Ordinary been obtained? (C. 1269, § 3).
7. Is olive oil or a bees wax candle used in the sanctuary lamp? Is the lamp kept burning day and night? (C. 1271).
8. Is any unusual picture or statue ever placed in the Church or Oratory? (C. 1279). (E. g., the Blessed Virgin clad in priestly vestments—*A.A.S.*, VIII [1916], 146; the Holy Ghost in human form, etc.—*A.A.S.*, XX, [1928], 103).

O. *Cemeteries*

1. Has the Community a private (or special) burial ground? Was it erected with the permission of the Bishop? (C. 1208, § 3).
2. Have the novices and postulants been acquainted with their right to choose any other Church of funeral and any other burial ground? (Canons 1221, § 1 and 1224, 2°).
3. Is the cemetery surrounded by a fence or wall? (C. 1210).
4. Was it blessed or consecrated? By whom? (Canons 1205, 1155).
5. Has the Community a Death Registry, which is provided for the minister to make the prescribed entries? (C. 1238).

P. *Soliciting* (C. 622, §§ 1, 2).

1. Are alms, stipends, moneys, donations or contributions of any kind sought from the general public, or from unknown individuals, by personal visits to them? If so, specify.
2. (To be asked in a Community of Pontifical Approval).
   a) Has the Holy See issued an indult for this? Exhibit document.
   (To be asked in a Community of Diocesan Approval).
   b) Has the consent of the Bishop been obtained. Exhibit document.

(Any other questions regarding the visiting of former benefactors for new aid, the sending of written or printed general appeals through the mails, the selling of chance books or magazine subscriptions, may be asked if the Bishop wishes to prohibit these practices).

Q. *Publications*

1. Have any members of the Community published any books, magazines, newspaper articles, dealing with: a) Sacred Scripture or Exegesis? b) Theology? c) Church History? d) Canon

Law? e) Natural Theology? f) Ethics? g) Any other religious or moral science? h) Politics? i) Divorce? j) Marriage? k) Birth Control? l) printed Holy Cards, with or without prayers? m) or published prayers, devotions, or religious instructions? (Cc. 1385, § 1; 1386, § 1).

2. What Bishop's permission was obtained for the above? (C. 1385, § 2).
3. Was any of these acts done under a pen name?
4. Has any article been given to newspapers or magazines which are inimical to the Church? Was the Bishop's permission previously obtained? (C. 1386, § 2).
5. Has any collection or list of Indulgences been published? With the permission of whom? (C. 1388).
6. Have any liturgical books, or parts thereof, or litanies approved by the Holy See been published? By whose authority? (C. 1390).
7. Do you know of any pernicious books published or sold in this territory? (C. 1397).

R. *Pious Foundations* (Canons 1544-1550)

1. Have any pious foundations been received?
2. What type? Amount received? Length of time of fulfillment?
3. Was the consent of the Bishop obtained to accept them?
4. Can you still fulfill the obligation?
5. Was the amount received below the minimum demanded by Diocesan Statutes? (If no Statutes, was amount adequate?)
6. Has a copy of the articles of foundation been sent to the Chancery Office?
7. Is the foundation actually being fulfilled?
8. How is the money invested?
9. Exhibit account book showing all perpetual and temporary obligations, their fulfillment and stipends paid?

S. *Personal* (C. 618, § 2, 2°). (To be omitted in the case of Clerical Communities.)

1. Have the Constitutions been observed in the practice of the vow of poverty?
2. Is obedience properly observed according to the Constitutions?
3. Do you know of any flagrant violations of the vow or of the Constitutions regarding obedience?
4. If there are frequent manifestations of disobedience what is the cause thereof in your opinion?
5. Is the external modesty demanded by the Constitutions carefully observed by the members of the Community?
6. Are any particular friendships, within or without the house cultivated to the detriment of the Community?
7. Is there anything you feel you ought to mention regarding the observance of the vows personally?
8. Are the common spiritual exercises accurately fulfilled according to the Constitution? Meditation? Office? Particular Examen? Table Prayers? Visits to the Blessed Sacrament? Days of Recollection?

9. Have you absented yourself from the above without the proper permission demanded by the Constitutions?
10. When it has been necessary to miss the above, have you supplied for the deficiency later in the day?
11. Have you attended Mass daily?
12. Is your freedom regarding the frequency of receiving Holy Communion interfered with? (C. 595, § 2).
13. Do you receive Holy Communion frequently?
14. Have you an opportunity to go to Confession regularly?
15. Do you observe the conventual silence demanded by the Constitutions? Is it ever broken needlessly? What is the general condition of the house in this regard?
16. Do you observe the silence according to the Constitutions between Night Prayers and Morning Meditation? How is this observed in the house generally?
17. How do you observe the Constitutions regarding the time to retire? What is the general condition of the house toward this?
18. How do you observe the Constitutions regarding fraternal charity? Do serious breaches occur? With what frequency?
19. Are any members of the Community made the objects of ridicule? To what extent?
20. Is recreation in common held according to the Constitutions? Do you absent yourself from this without sufficient reason? Without the proper permission?
21. Is reading at meals observed according to the Constitutions? Do you observe the silence required at these meals? Is the reading ever dispensed with except for a good reason?
22. Are the Constitutions observed regarding equality in the matter of food, clothing, and other necessities of life? If not, specify. Is it ever necessary to seek these things from outside the Community rather than to petition the proper Superior? If so, state specific instances.
23. Is the food as simple as the Constitutions demand? Is the standard below what the Constitutions allow? To any appreciable extent?
24. Are the sick well provided for according to their particular medical needs? Their spiritual needs?
25. Are the Constitutions observed regarding the apportionment of work without discrimination? Without injury to health?
26. Do you observe the Constitutions regarding the sending and receiving of mail without permission? What is the general condition of the house in this respect?
27. Is your right to sealed correspondence with your higher Superiors respected? With the Superior of the house when either of you is absent? With the Bishop? If not, specify. (C. 611).
28. Are the Constitutions observed regarding visiting in private homes? In rectories? Regarding the receiving of visitors? Has any excess in this been a detriment to spiritual life? To the order of the house?

29. Have the Constitutions been observed regarding the attendance at public functions? Has the proper permission always been obtained? Has the hour of return always been according to the Superior's wishes? Has there been any excess in this to the detriment of spiritual life? To the order of the house?
30. Have the Constitutions been observed regarding the attendance at public entertainments, shows, etc.? If permitted by the Constitutions has the proper permission always been obtained?
31. Has the religious garb been worn as prescribed by the Constitutions? At all prescribed times?
32. Is a priest from outside the Diocese ever invited to preach to the Community? Who obtains faculties from the Bishop for him? (C. 1338, § 3).
33. Are the lay religious who teach catechism given any special training for this work?
34. Is the novices' portion of the house segregated from that of the professed? (C. 564, § 1). Does anyone of either group communicate with the other without the permission of the Superior or the Master (or Mistress) of Novices?
35. Are the laws of the Code and the Constitutions observed regarding entrance to, and duration of the Novitiate? (Cf. Canons 542, 544, 546, 553, 555-558, 565).

Section II

part 2

(For Women Only)

T. *Confessions*

1. Are confessions heard each week? (C. 595, § 1, 3°).
2. Have you any serious objection to your regular confessor? If so, specify.
3. Is any priest beside the regular confessor ever called in to hear the confessions of the whole Community? Of all the Novices? (C. 876). If so, is this one of the supplementary confessors? (C. 521, § 2).
4. Do you present yourself four times a year to the Extraordinary confessor? (C. 521, § 1).
5. Is a request to call the Extraordinary or Supplementary confessor ever denied by the Mother Superior? Is inquiry made as to your reason for asking that either be called? (C. 521, § 3). Is any displeasure at this request ever shown, either directly or indirectly? (C. 2414).
6. Is any obstacle ever placed to prevent your going to Confession in any Church or Chapel to any priest whatsoever? (C. 522). Does the Mother Superior either directly or indirectly inquire as to your reason for going? (C. 2414).

7. Are the Sisters permitted to call any priest whatsoever, when, and as long as they are seriously ill? (C. 523). As often as they wish? (*Loc. cit.*). Is this ever directly or indirectly prohibited? (C. 2414).
8. Is the external or internal government of the house in any way interfered with by the Ordinary or Extraordinary confessors? (C. 524, § 3).

U. *Cloister* (Whether it is a *Domus Formata* or *Non-formata,* every house or residence of sisters should have a partial enclosure patterned after the papal enclosure of Canons 597-603).

1. Have the limits of the enclosure been established by the Bishop? Or changed without his consent?
2. Are those parts of the house which the Constitutions demand included in the enclosure?
3. Is there a sign or notice at each entrance?
4. Are extern women admitted to the detriment of the religious spirit of the house? To the freedom of the individual members of the Community?
5. Are men admitted at all if the Constitutions so forbid?
6. If not absolutely forbidden to admit men, is this ever done without a just and reasonable cause? Or without the proper consent of the Superior?
7. Are priests admitted? With what frequency? Is it a cause of scandal in or outside the Community?
8. Are you ever permitted to leave the house without a companion? (C. 607).

V. *Funerals*

1. (At house not exempted from parochial territory): Are Sisters' funeral services conducted at the parish church to which they were attached at death? (C. 1230, §§ 1, 5).
2. (At house exempted from parochial territory): Is the Chaplain's right to conduct the funeral services of deceased Sisters recognized? (C. 1230, § 5). Is any other priest ever invited to conduct these services without consulting the Chaplain?

W. *At Motherhouse Only*

1. Is a dowry demanded by the Constitutions? If so:
   a) Is a dowry ever lessened or entirely dispensed with, without an indult from the Holy See? (C. 547, § 2). Without permission of the Bishop? (In the case of a Community of Diocesan Approval).
   b) Was the dowry invested before profession? (C. 549).
   c) Exhibit books showing management of the dowry funds. (C. 535, § 2). (N.B. If a delegate is making the Visitation for the Bishop, a complete report on the manner and nature of the investment, the amount, the method of keeping the dowry fund separate from other funds, etc., should be made).

d) When a dowry is invested, is the consent of the Council obtained? (C. 549).

e) Has any particular Sister's dowry been spent even partially while she still lived? (C. 2412).

f) In the case of death of a postulant or novice, has her dowry been returned in entirety to her heirs or legatees? (C. 548).

g) When a novice, postulant, or professed Sister leaves, or is forced to leave, the religious life for any reason whatsoever, is her dowry returned in entirety? (C. 551).

2. If a dowry is not demanded by the Constitution, or if the dowry is small:

a) When a member leaves the religious life, is the sum given her sufficient to enable her to return home and provide for herself until such a time as she can rehabilitate herself? (C. 643, § 2).

3.

a) Is anyone ever admitted to the Novitiate, or to temporary or to perpetual vows without submitting to examination by the Bishop or his delegate? (C. 552, § 1).

b) Is notification of the approaching Reception or Profession always sent to the Bishop at least two months in advance? (C. 552, § 2).

Section III

(To be asked Congregations of Diocesan Approval, whether Lay or Clerical.)

PART 1

(For Men and Women)

X. *Personal*

1. Have the temporary or perpetual vows been made to the person designated by the Constitution? If not, to whom? (C. 572, § 1, 6°).
2. Has the acquisition of property followed the rules of the Constitutions regarding Community ownership? (C. 594, § 1).
3. Are the Constitutions carefully observed regarding annual retreats? (C. 595, § 1, 1°). Where was the last retreat made?
4. What is the general attitude of the Community during the retreats?
5. Are the Chapter meetings held according to the Constitutions?
6. Is the Chapter of Faults regularly held and carried out conscientiously?
7. Are the general or local Superiors guilty of grave neglect of duty in any matter? If so, specify.
8. Is the Council consulted in the government of the Community?
9. Are the Constitutions read publicly each year to the members of the Community? (C. 509, § 2, 1°).
10. Has any member with temporary vows been dismissed without the Bishop's knowledge and permission? (C. 647, § 1).
11. Has any member in perpetual vows been dismissed without the decree of the Bishop in that regard? (C. 652, § 1).

12. Has any member in perpetual vows been dismissed by a local Superior for any reason whatsoever without the permission of the Bishop? (C. 653).
13. Has any religious Superior, the Master (or Mistress) of Novices, or the Spiritual Prefect induced you in any way (directly or indirectly, by precept, counsel, intimidation, threats, flatteries) to manifest your conscience as to
    a) Your interior or hidden acts of virtue?
    b) Your intentions?
    c) The affections and repugnances to which you may have yielded?
    d) The temptations or trials which you have undergone?
    e) Any special lights you may have received, or good desires you may have elicited? (C. 530).
14. Has anyone directly or indirectly solicited your vote, either for himself (herself) or for anyone else?
15. Have any candidates for a coming election been discussed in your presence?

Y. *Regarding the House*

1. Has the external purpose of the house been changed since the last Visitation? If so, with the permission of whom? (C. 497, § 4).
2. Exhibit report of the financial administration of the house. (N.B. The degree of completeness of the written report will depend on the wishes of the Bishop if the Visitation is made by a delegate. At least list: a) present assets and liabilities, and their nature. b) average yearly income and expenditures of past five years.)
3. Are lay people employed? (C. 1524). State salary, age, hours of work, and whether male or female for each.
4. Is each lay employee free to perform his (or her) duties to his family?

Section III

part 2

(*For Women Only*)

Z.

1. Has the Bishop's permission been obtained for *any* investment or change of investment? (C. 533, § 1, 1°, § 2).
2. Has the Bishop's permission been obtained for alienations, contracting debts or obligations in excess of $200.00? (C. 534, § 1).
3. Has a financial statement listing all the debts or other liabilities and assets accompanied every petition to the Bishop for permission to alienate or contract new obligations? (C. 534, § 2).